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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 544

HARRY A. GAIR, EMILE Z. BERMAN, ROBERT C. KILROE, DAVID C. BRODERICK and JOHN J. TULLMAN,

Appellants,

v.

The Honorables DAVID W. PECK, CHARLES D. BREITEL, BERNARD BOTEIN, BENJAMIN J. RABIN, MARTIN M. FRANK, FRANCIS L. VALENTE and JAMES B. M. McNALLY, individually and as Justices of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department,

Appellees.

JURISDICTIONAL STATEMENT

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Appellees.

JURISDICTIONAL STATEMENT

Introduction

Appellants, New York lawyers affected by Special Rule 4 of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (hereinafter referred to as "Rule 4"), appeal from a final order and judgment (two Judges dissenting) of the Court of Appeals of the State of New York, which reversed and vacated a summary judgment of the Supreme Court of the State of New York, unanimously affirmed by the Appellate Division, Third Judicial Department, of the Supreme Court of the State of New York.

The reversed judgment had declared that the defendants, (appellees, herein), constituting the Justices of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, were without power to promulgate and enforce Rule 4 and that, therefore, the said Rule was void, invalid and of no effect.

Opinions Below

The opinion of Mr. Justice HAROLD A. STEVENS, granting plaintiffs' (appellants, herein) motion for summary judgment has been officially reported. *Gair* v. *Peck*, 6 Misc. 2d 739, 165 N. Y. S. 2d 247.

The *per curiam* opinion of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, unanimously affirming the original judgment, has, likewise, been officially reported. *Gair* v. *Peck*, 5 A. D. 2d 303, 171 N. Y. S. 2d 594.

The majority opinion of the Court of Appeals of the State of New York and the two dissenting opinions, all appended hereto as Appendix A, have also been officially reported. *Gair* v. *Peck*, 6 N. Y. 2d 97.

Jurisdiction

(i) This is an action for a declaratory judgment, brought pursuant to § 473 of the Civil Practice Act of the State of New York.

(ii) The judgment sought to be reviewed is a final order and judgment of the Court of Appeals of the State of New York, made and entered in that Court on May 28, 1959, which was made a judgment of the Supreme Court of the State of New York, pursuant to New York practice, by a Judgment on Remittitur of the Court of

Appeals made in the Supreme Court of the State of New York on August 18, 1959 and entered in the office of the Clerk of the County of New York on August 19, 1959. A motion for reargument was made by plaintiffs-respondents (appellants, herein) in the Court of Appeals of the State of New York, which, by an order made and entered in that Court on July 8, 1959, denied reargument. The notice of appeal, herein, was filed on October 1, 1959 with the Clerk of the Supreme Court of the State of New York, County of New York (the County Clerk of New York County), that Court being possessed of the record.

(iii) The statutory provision believed to confer jurisdiction of the appeal on the Supreme Court of the United States is 28 U. S. C. § 1257 (2).

(iv) The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States to review the order and judgment appealed from on direct appeal in this case:

King Mfg. Co. v. *Augusta*, 277 U. S. 100, 102-114, reviewing the judicial history of the principle that any enactment, from whatever source originating, to which a state gives the force of law, is a "statute of a state", within the meaning of that phrase as presently codified in 28 U. S. C. § 1257 (2);

Williams v. *Bruffy*, 96 U. S. 176;

Live Oak Water Users' Asso. v. *Railroad Commission*, 269 U. S. 354, 356;

Hamilton v. *Regents*, 293 U. S. 245, 258;

Illinois v. *Board of Education*, 333 U. S. 203, 206.

(v) The statute whose validity is involved in the present case is Rule 4 of the Special Rules of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, as implemented

by Rule 1 of the same Special Rules. The text thereof being lengthy, the same is set forth in Appendix B of this Jurisdictional Statement. The official citation of the Rule is Vol. 136, No. 118 *New York Law Journal* (December 20, 1956), page 1, column 3.

The Questions Presented by This Appeal, Expressed in the Terms and Circumstances of the Case

1. Rule 4 of the Special Rules of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, entitled "Contingent Fees in Claims and Actions for Personal Injury and Wrongful Death" (hereinafter referred to as Rule 4") provides that the receipt, retention or sharing of compensation in excess of scheduled fees set forth in the Rule "shall constitute the exaction of unreasonable and unconscionable compensation" in violation of the Canons of Professional Ethics "unless authorized by a written order of the court" because of "extraordinary circumstances." The effect of Rule 4 is to subject lawyers to disbarment or other disciplinary action if they receive, retain or share fees in excess of the schedule. The statutes of New York, as uniformly interpreted, provide that the compensation of an attorney shall be fixed with an adult and competent client by the agreement of the attorney and client in the absence of fraud or overreaching. Does Rule 4 deprive attorneys of liberty and property without due process of law?

2. Rule 4 is applicable only to attorneys who have their offices in the First Judicial Department or who commence an action or proceeding therein. The First Judicial Department embraces but a small segment of the State of New York, and, indeed, only two of its 62 counties and only two of the five counties within the City of New York. New York attorneys are admitted to practice "in

all of the courts of the State of New York" and no statute provides for limitation of fees in a single segment of the practice or in a single area as provided by Rule 4. Does Rule 4 deprive attorneys subject to it of the equal protection of the laws?

3. Rule 4 requires that attorneys who believe they are entitled to greater compensation than the schedule therein provided (but only under "extraordinary circumstances") must make separate application to a court to fix a higher fee than that set forth in the schedule. Attorneys who are not covered by Rule 4 are not required by New York law to make such application and may, in the absence of fraud or overreaching, whether in ordinary or extraordinary cases, fix and collect their fees by agreement wit adult, competent clients and the New York courts will not interfere with or regulate the amount of the fees so fixed by attorneys not subject to the Rule. Does Rule 4 deprive the attorneys subject to it of due process of law and equal protection of the laws by refusing them the same access to the courts for the protection of their rights and the enforcement of their contracts as are enjoyed by the attorneys within the State of New York not subject to the Rule?

4. Under the well-established common law of the State of New York and by long-standing, uniform and settled interpretation of New York statutes by New York courts, the regulation and fixation of fees is and has been a matter for legislative determination. Does Rule 4 deprive the attorneys subject to it of due process of law and of the equal protection of the laws through the infringement by the defendants, as a court, upon the legislative prerogative?

5. By reason of its violation of the classic principle that classification is a legislative and not a judicial function, does Rule 4 deprive attorneys subject to it of liberty

and property without due process of law and of the equal protection of the laws?

6. Does Rule 4 deprive attorneys subject to it of due process of law and of the equal protection of the laws in the light of the fact that there is no evidence in the record upon which the classification set forth in the Rule can be premised?

7. In the prevailing opinion in the New York Court of Appeals (6 N. Y. 2d 97 at page 104), it was admitted that Rule 4 would be fatally defective if it established a principle of substantive law, since the defendants, as a court, "cannot make substantive law by rules". In the same opinion (at page 114) the making of Rule 4 by the defendants was sought to be justified upon the ground that the Rule is "of merely presumptive effect, like a burden of proof which pertains to procedure and is not substantive law". May the Supreme Court of the United States, despite the declaration by the New York Court of Appeals that Rule 4 merely sets up a rule of evidence—burden of proof—examine the Rule and, upon such examination, determine that the Rule is actually an attempt to set up a principle of substantive law, which deprives attorneys subject to it of due process of law and the equal protection of the laws, and is, therefore, unconstitutional and void?

8. Does Rule 4, in purporting to set up a legislative presumption of fact, under the guise of regulating the presentation of evidence, operate to preclude appellants from the right to present their defense to the main fact thus presumed and, by so operating, deprive appellants of due process of law and the equal protection of the laws?

Statement of the Case

Plaintiffs (appellants, herein), New York lawyers affected by Special Rule 4 of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, brought an action against defendants (appellees, herein), the Justices of the said Appellate Division, demanding judgment against the defendants:

> "declaring that the defendants and the Court in which they serve are without power to promulgate and enforce the said Rule 4 and that, therefore, the said Rule 4 is void, invalid an of no effect and that plaintiffs and others similarly situated shall have the right to disregard the same and that plaintiffs and others similarly situated are not bound by any legal relation to the said rule or the necessity of its observance".

Rule 4 is applicable only to attorneys who have their offices in the First Judicial Department or who commence an action or proceeding therein. This limitation is prescribed by Rule 1 of the same Special Rules.

There is no dispute as to the facts. Appellees promulgated and threaten to enforce Rule 4. Appellants assert that the Rule and its threatened enforcement violate their rights under the Fourteenth Amendment to the Constitution of the United States.

Appellants made a motion for summary judgment in the Supreme Court of the State of New York, County of New York, the court of first instance, herein. Under New York practice such a motion is heard and determined upon affidavits. Appellants in their moving affidavit for summary judgment (the first opportunity they had to raise the point) asserted that appellees were and are

without constitutional power to promulgate and enforce Rule 4 "and that such action is a violation of plaintiffs' rights and that, by the action of defendants, if upheld, plaintiffs are being and will be deprived of liberty and property without due process of law and that plaintiffs' contracts are being and will be impaired, all in violation of the Constitution of the United States and its amendments". (Papers on Appeal to the Court of Appeals, fols. 39-40).

The court of first instance granted appellants' motion for summary judgement, struck out the answer of appellees and decreed that "the defendants and the court in which they serve are without power to promulgate and enforce Rule 4", with two exceptions not pertinent to the present appeal (*Ibid.*, fols. 17-18). The opinion of Mr. Justice STEVENS in the court of first instance (*Ibid.*, fols. 464-216; 6 Misc. 2d 739, 165 N. Y. S. 2d 247) was mostly concerned with matters involving New York State law, which he decided in favor of appellants. In passing, the opinion took cognizance of the fact that the question of violation of appellants' constitutional rights had been raised, but merely made a general statement with respect to the rights of individuals to contract and did not rest decision upon a constitutional point (*Ibid.*, fols. 209-210).

Appellees, herein, appealed to the Appellate Division, First Judicial Department. The Justices of that Court, being the defendants in the action, transferred the case for hearing to the Appellate Division, Third Judicial Department. Under New York practice, the Case on Appeal to the Appellate Division consisted only of the original record (wherein, as has been stated above, the constitutional point was specifically raised in the moving affidavit) together with the order appealed from and the opinion in the court of first instance. The brief of the appellants, herein, to the Appellate Division, Third Judicial Department, specifically covered the questions of

denial of due process of law and of the equal protection of the laws. Under New York practice, this was the only manner by which the constitutional question could be raised on appeal. The Appellate Division, Third Judicial Department, unanimously affirmed the summary judgment granted by the court of first instance. Its opinion (Papers on Appeal to the Court of Appeals, fols. 256-267; 5 A. D. 2d 303, 171 N. Y. S. 2d 594) was entirely concerned with New York State questions and did not touch upon the constitutional question, except indirectly, when it said (*Ibid.*, fol. 265):

> "Viewed in broad aspect and in the light of its general impact, the rule seems clearly to restrain agreements for compensation. We do not consider that its effect is materially mitigated by the provision that application may be made for compensation in excess of the scheduled amount in 'extraordinary circumstances'. The compulsion and constraint remain. To say that freedom of contract remains unimpaired, when its exercise is under penalty of stigmatization and disciplinary measures, is to deny reality."

Appellees, herein, appealed to the Court of Appeals of the State of New York, which reversed the summary judgment and directed that summary judgment be entered in the court of first instance in favor of said appellees (6 N. Y. 2d 97). The Court of Appeals of the State of New York amended its Remittitur, herein, certifying that there was presented to and necessarily passed upon by the Court of Appeals the contention of appellants, herein, that the promulgation and threatened enforcement of Rule 4 deprived and continue to deprive them of liberty and property without due process of law and denied and continue to deny them the equal protection of the laws, all in violation of the Fourteenth Amendment to the Constitution of the United States, and that the Court of Appeals held that there was no such deprivation or denial. (Transcript, herein, pp. 2A-3A).

The judgment entered in the court of first instance upon the Remittitur of the Court of Appeals also declared that Rule 4 "does not deprive the plaintiffs of due process of law or of the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States." (*Ibid.*, page 5a).

Under New York practice, the only way to raise the constitutional question in the New York Court of Appeals was by brief, since the record was closed prior to reaching that court. Point Four of the brief of appellants, herein, to the New York Court of Appeals specifically raised the constitutional question. The majority opinion of the New York Court of Appeals dismissed the constitutional problem by stating that the effect of the Rule was such that it is "not subject to attack on the grounds that it is parochial" (6 N. Y. 2d at page 108). The vigorous dissenting opinion of Judge BURKE, however, stated (6 N. Y. 2d at pages 122-123):

> "Rule 4 suffers from the same infirmity. If legal, it should be applicable to all cases of like character, not only to cases where the attorney has his office in the First Department, or to cases which are tried in the First Department. Hence, the Appellate Division, First Department, has no power under section 83 of the Judiciary Law to promulgate this 'special rule'. Hence, lawyers in one part of the State may seek enforcement of a contingent fee retainer in the courts of law but, in the First Department, an action may not be brought if the compensation provided for in the agreement exceeds the limits provided for in rule 4. Such discrimination between citizens of the State with regard to their access to our courts is a violation of the due process and equal protection clauses of the State and Federal Constitutions. (See *Gregonis v. Philadelphia & Reading Coal & Iron Co.*, 235 N. Y. 152, 159.)"

The majority opinion of the New York Court of Appeals, holding that Rule 4 merely establishes a procedural burden of proof, imported a new constitutional question into this case. This question had not been briefed or argued by the parties, below, since they had not considered Rule 4 to mean what the majority opinion of the Court of Appeals said it meant. Under New York practice, the only manner in which this question could be raised was as part of a motion for reargument. Appellants, herein, specifically raised the question on that motion in the following language (Motion Papers, pages 15-16):

> "However, over and above the questions already presented, considered and passed upon, this Court has created a *new* constitutional problem, because of its interpretation of Rule 4. The prevailing opinion has stated that Rule 4, in effect, creates *a procedural burden of proof* (whether the Court meant the burden of going forward with the proof, or of establishing a case by preponderance of the evidence is not clear), applicable *only* to cases involving attorneys who maintain their office in the First Judicial Department or who bring certain tort actions there.
>
> "The *new* constitutional question is whether the creation of a burden of proof *applicable only to one group of citizens of a state or to one geographical area* does not constitutionally deprive plaintiffs respondents of liberty and property without due process of law and deny them the equal protection of the laws.
>
> "It is respectfully submitted that reargument should be granted as to this *new* constitutional question, heretofore unbriefed and unargued, since it was imported into the case for the first time by the prevailing opinion of this Court."

The Court of Appeals of the State of New York denied reargument, but amended its Remittitur in the manner

set forth in the next subdivision of this Jurisdictional Statement.

The Questions Are Substantial

On July 8, 1959, the Court of Appeals of the State of New York amended its Remittitur, herein, by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Respondents contended that the promulgation and threatened enforcement of Rule 4 of the Special Rules of the Appellate Division, First Judicial Department, of the Supreme Court of the State of New York deprived and continue to deprive respondents of liberty and property without due process of law and denied and continue to deny respondents the equal protection of the laws, all in violation of the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals held that there was no such deprivation or denial.". (Transcript, herein, pp. 2a-3a).

The Judgment on Remittitur of the Court of Appeals, made in the New York Supreme Court, New York County, on August 18, 1959 and entered in the office of the Clerk of the County of New York on August 19, 1959, "declaring the rights and other legal relations of the parties," herein, stated in part:

> "1. That the defendants had the power pursuant to the Judiciary Law of the State of New York, §§ 83 and 90 to make, promulgate and enforce Rule 4 of the Special Rules of the Appellate Division of the Supreme Court, First Judicial Department, relating to 'Contingent Fees in Claims and Actions for Per-

sonal Injury and Wrongful Death', as adopted on September 21, 1956 and as amended on December 19, 1956. Such Rule 4 is, therefore, valid and effective in all of its provisions and the plaintiffs are subject thereto and bound thereby.

"2. That the aforesaid Rule 4 of the Special Rules of the Appellate Division of the Supreme Court, First Judicial Department, as amended, does not deprive the plaintiffs of due process of law or of the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States." (Transcript, herein, pp. 4a-5a).

From the foregoing, it appears that the validity of a "statute of a state", within the meaning of 28 U. S. C. § 1257 (2), is involved in the present case.

Upon the determination of this cause may well rest the continuing vitality of the bar as an independent and valuable component of the judicial process. The ability of lawyers throughout the nation fearlessly to press the rightful contentions of their clients can easily be destroyed, or at least substantially impaired, if a court has constitutional power to restrict and limit fees whenever it sees fit so to do, despite the agreement between an attorney and his adult, competent client for the compensation of the lawyer, even though the agreement, itself, was fairly arrived at without fraud or overreaching. If Rule 4 is sustained as constitutional, the measure of control by the courts over the livelihood of lawyers, in situations completely divorced from any charge of misconduct or overreaching, may become so great that subservience to judicial whim will prevail over fearless advocacy. Absent such advocacy, justice cannot be done under our system of adversary litigation.

In the circumstances of the present case, the dangers are emphasized by the fact that Rule 4 does not apply to all lawyers in the State of New York but only to

those practicing or bringing cases within two out of sixty-two counties and in a single field of the law (personal injury tort and wrongful death) and that Rule 4 was not adopted by the legislature, which traditionally has governed the matter of attorneys' compensation in the State of New York, nor even by the concurrence of the Justices of all the Appellate Divisions in New York State, upon whose concurrence general rules of practice may be promulgated, provided such rules are "not inconsistent with any statute". N. Y. *Judiciary Law* § 83.

The general New York statute covering the matter of compensation of lawyers (N. Y. *Judiciary Law* § 474) reads, in applicable part:

> "The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law * * *."

Other New York statutes give individual courts power to fix or regulate fees in specific instances, not here involved, such as cases of infants or incompetents, condemnation and real estate reorganization proceedings, decedents' estate matters and the like. The very existence of these statutes is proof of the legislative control of the fee-fixing and regulating procedure.

The right of a New York attorney freely to contract with his client, as now expressed in section 474 of the New York *Judiciary Law*, is the product of a progressive judicial and legislative program for "protecting members of the bar". *Fischer-Hansen* v. *Bklyn. Heights R. R. Co.*, 173 N. Y. 492, 495-497, tracing the history of the development of section 474 and stating (173 N. Y. at page 498):

> "Thus we have a statute gradually progressing in one direction, which has required more than half a century for its development. It consists of only three sentences, but each has been the subject of one

> or more independent enactments intended to protect attorneys and enable them to collect pay for their services. The first establishes freedom of contract between attorney and client with reference to the compensation of the former."

By their own uniform and well-settled construction of section 474, New York courts have iterated and reiterated the established rule that, in the absence of proof of fraud or overreaching, they are powerless to interfere with or modify attorney-client contracts for compensation of the attorney. *Application of Knapp*, 85 N. Y. 284, 296; *Matter of Fitzsimons*, 174 N. Y. 15, 23-24; *Martin v. Camp*, 219 N. Y. 170, 173.

Rule 4 effectually deprives an attorney who maintains his office in the First Judicial Department or who brings tort actions there of his hard-gained liberty of contract and his property in the fruits of such a contract, without due process of law. Although it does not, in specific terms, state that the right is abolished, Rule 4 implies such drastic penalties (which the appellees admit they intend to exact) for an attempt to enforce in the courts certain attorney-client contracts that the attorney in the narrowly confined group covered by it has nothing left but a "metaphysical subtlety, an immortal right to bring an eternally prohibited action." (Ames, *Lectures on Legal History*, p. 199). Such an attorney is left with a naked right, historically founded, but unenforceable because the courts have been closed to him through the effective threat of dire penalty if enforcement is attempted. Yet every other attorney in the State of New York is free, without danger or threat of penalty, to enforce his contracts for compensation made with competent, adult clients, in the absence of fraud or overreaching.

Under New York law, the Appellate Division of the Supreme Court in the department in which an applicant resides, "if it shall be satisfied that such person possesses

the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state." N. Y. *Judiciary Law* § 90. There is no statute or constitutional provision of New York that permits or authorizes classification of lawyers by geographical area or type of practice, nor is there any statute or constitutional provision which permits disciplinary action aganst a lawyer except for personal misdeeds. A lawyer, upon his admission to the bar, has the absolute right to practice "of which he can only be deprived by the judgment of the court, for moral or professional delinquency." *Ex Parte A. H. Garland*, 71 U. S. 333, 18 L. Ed. 366, 370. Rule 4, if upheld, would permit a single court with jurisdiction in a narrowly confined area of the State, to limit the ability of *certain* lawyers, not charged with moral or professional delinquency, freely to contract with their adult, competent clients and receive compensation provided for in such contract. It is difficult to envisage a clearer case of deprivation of liberty and property without due process of law and denial of the equal protection of the laws.

It was not within the province of the appellees, as a court, to narrow the beneficent provisions of section 474 of New York's *Judiciary Law* under the guise of construing that statute to exclude therefrom lawyers practicing in a single branch of the law or making their offices or bringing cases within a restricted area. Section 474 is in general terms and applies to all New York lawyers, in whatever legal field or geographical area they may be practicing. "When the words [of a statute] are general and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all." *United States* v. *Hartwell*, 73 U. S. (6 Wall.) 385, 18 L. Ed. 830, 833. And

it is not within the power of a court to deny the benefits of a general financial statute to a professional group singled out for such denial by the court merely upon the ground that the members of the court disapprove the ethical practices of the group, since it is the province of the legislature to translate progressive standards of professional conduct into law. *Lilly* v. *Commissioner of Int. Rev.*, 343 U. S. 90, 97, 96 L. Ed. 769, 775.

The New York legislature has repeatedly and consistently refused to grant power to the courts of New York to regulate fees within the area covered by Rule 4 and this fact has been uniformly acknowledged by the New York bar. *Association of Bar of City of New York Reports*, Vol. 65, Set D No. 475 [1938 Annual Reports, pp. 295-296]; Vol. 80, No. 649 [1943]; *Bronx County Bar Assn. Report* (in Library, Assn. of Bar of City of New York), fol. n p 1940 in folio gam v. 245; 31 *N. Y. State Bar Assn. Rep.* 121 [1908]. Even in the absence of that factor, however, the classification of groups of lawyers in New York State, attempted by the "construction" undertaken by appellees, is, in itself, a violation of the established principle that classification is a legislative and not a judicial function. *Clark* v. *Gray*, 306 U. S. 583, 83 L. Ed. 1001, 1010; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 298, 42 L. Ed. 1037, 1044.

In *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. Ed. 923, 924-925, this Court stated:

> "The 14th Amendment, in declaring that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like

> circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, * * *".

Every one of the restrictions set forth in the foregoing quotation is violated by Rule 4. Under Rule 4, lawyers who have their offices in the First Judicial Department or bring tort actions there are deprived of access to the courts for the enforcement of their rights similar to the access granted to lawyers not covered by the Rule. They may not even enforce their contracts with adult, competent clients unless they go through a special proceeding which the other lawyers in the State are not required to undertake. Even that special proceeding is limited to "extraordinary circumstances" and the court which entertains it is not required to apply the standard permitted to other lawyers in New York, but may change or amend the contract between the lawyer and his client. Furthermore, under Rule 4, a lawyer covered by it who chooses to depend upon the rights granted to all other lawyers in the State may be subjected to disciplinary action if he fails to go through the special proceeding which the Rule dictates. This provision makes the Rule unconstitutional on its face. *Ex Parte Young*, 209 U. S. 123, 148, 52 L. Ed. 714, 724.

The prevailing opinion of the New York Court of Appeals herein, after admitting that Rule 4 would be

fatally defective if it established a principle of substantive law (6 N. Y. 2d at page 104), attempted to uphold the validity of the Rule by stating that it is "of merely presumptive effect, like a burden of proof which pertains to procedure and is not substantive law" (6 N. Y. 2d at page 114). This Court is not foreclosed by the determination of the New York Court of Appeals that Rule 4 simply sets up a burden of proof—a rule of evidence. This Court has full power to examine Rule 4 and, since there is no dispute as to the facts, this Court is "at as full liberty to consider them as was the state supreme court. * * * Nor does the court's declaration that the statute is a rule of evidence bind [this Court] in such an investigation. * * * If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here." *Tryax v. Corrigan*, 257 U. S. 312, 324, 66 L. Ed. 254, 259. The merest reading of Rule 4 establishes that it is not merely procedural, but sets up substantive criteria for the charging of fees in one section of New York State and in one field of legal practice different from the criteria in all other sections and fields, disobedience of which subjects a lawyer to the danger of disbarment or other disciplinary action.

Even if the statement of the New York Court of Appeals that Rule 4 is merely a procedural provision were to be accepted, it nevertheless would violate the constitutional rights of appellants, since it is not within the province of a court, by rule, to set up a different rule of evidence for one area of a state or for one class of persons than that which generally applies throughout the state and to all classes of persons. Indeed, the violation of appellants' constitutional rights would be clear even in the absence of the parochial nature of Rule 4; because, as this Court has said, "[h]owever convenient the rule might be to regulate the general practice of the courts, we think that it could not control the rights of

the parties in matters of evidence admissible by the general principles of law." *Doe, ex dem. Patterson v. Winn, et al.*, 33 U. S. (5 Peters) 233, 243, 8 L. Ed. 108, 112. "If the rule attempted to interfere with, or control the rules of evidence, it certainly could not be supported." *Mills v. The Bank of the United States*, 11 Wheat. 431, 439, 6 L. Ed. 512, 514. In the instant case, the rule not only attempts to interfere with the rules of evidence—burden of proof—but it admittedly creates a new rule of evidence, hitherto unknown to the courts of New York, and, in support of this new rule of evidence, creates a new procedure, likewise alien to the regular procedure in the courts of New York. It thus deprives appellants of that free access to the courts for enforcement of their rights that remains for the benefit of all persons not affected by Rule 4.

Rule 4 reads that the retention or sharing by attorneys affected thereby of compensation in excess of the fees scheduled in the Rule "shall" constitute exaction of unreasonable and unconscionable compensation in violation of the Canons of Professional Ethics of the New York State Bar Association, unless authorized by written order of the court in "extraordinary circumstances". By its use of the word "shall" the Rule creates a conclusive presumption, applicable to all except "extraordinary" cases. No opportunity is granted to attorneys affected by the Rule to rebut the presumption thus created in cases not deemed "extraordinary". Thus, under the guise of regulating the presentation of evidence, Rule 4 operates to preclude attorneys affected thereby from the right to present their defense to the "main fact thus presumed", to wit, that the retainer agreement and the receipt of compensation thereunder in excess of the fees scheduled by Rule 4, constitute the exaction of unreasonable and unconscionable compensation. The creation of this con-

clusive presumption is a denial of due process of law and of the equal protection of the laws. *Mobile, J. & K. C. R. Co., v. Turnipseed*, 219 U. S. 35, 43, 55 L. Ed. 78, 80-81. The gravity of this conclusive presumption is emphasized by the fact that, under New York law, the words "extraordinary circumstances" are a phrase of art. It is the law in New York that "extraordinary" means more than "difficult". Thus it has been held that even though a negligence action was tried six times, with five appeals to the Appellate Division and one to the Court of Appeals, the case was not "extraordinary" and did not justify additional compensation under § 1513 of the *New York Civil Practice Act*, which permits a court to grant an extra allowance to counsel as part of the costs in a case which is "difficult and extraordinary." *Kinsey v. New York Central & H. R. R. Co.*, 175 N. Y. S. 241, affd. 190 App. Div. 967, 179 N. Y. S. 929, cited with approval in *Montalbano v. New York Cent. R. Co.*, 49 N. Y. S. 2d 821, 822 (not officially reported), which held that no matter how difficult a case might be, it was not "extraordinary", since it was a negligence action.

Conclusion

On the basis of the foregoing, it is submitted that the questions here presented are substantial and appropriate to full briefing and oral argument before this Court.

Respectfully submitted,

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APPENDIX A

Opinions in the New York Court of Appeals*

COURT OF APPEALS
STATE OF NEW YORK

HARRY A. GAIR et al.,

Respondents,

v.

DAVID W. PECK et al., Individually and as Justices of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department,

Appellants.

Argued January 20, 1959; decided May 28, 1959.

APPEAL, by permission of the Appellate Division of the Supreme Court in the Third Judicial Department, from a judgment of said court, entered April 3, 1958, which unanimously affirmed a judgment of the Supreme Court at Special Term (HAROLD A. STEVENS, J.; opinion 6 Misc 2d 739), entered in New York County, adjudging that defendants and the court in which they serve are without power to promulgate and enforce rule 4 of the Special Rules of the Appellate Division, First Judicial Department, as adopted on September 21, 1956 and as amended on December 19, 1956 except subdivisions (e) and (f) thereof and that, therefore, the said rule 4 except the said subdivisions

* As officially reported in 6 N. Y. 2d 97. The text of the opinions herein set forth reproduces *verbatim* the typographical errors in the original.

is void, invalid and of no effect. The appeal was transferred to the Appellate Division, Third Department, by an order of the Appellate Division in the First Judicial Department dated October 22, 1957.

Louis J. Lefkowitz, Attorney-General (James O. Moore, Jr., of counsel), for appellants.

Frank H. Gordon, Robert M. Benjamin, Phillip W. Haberman, Jr., and W. Mason Smith, Jr., for Association of the Bar of the City of New York, *amicus curiae*, in support of appellants' position.

Howard Hilton Spellman, Samuel G. Fredman and *Henry A. Weinstein* for respondents.

David Stein and *Harry Cohen* for Bronx County Bar Association, *amicus curiae*, in support of respondents' position.

Louis E. Schwartz and *Louis M. Brass* for Brooklyn Bar Association, *amicus curiae*, in support of respondents' position.

N. Le Van Haver for Federation of Bar Associations of the Third Judicial District, *amicus curiae*, in support of respondents' position.

Thomas Schleier for Richmond County Bar Association, *amicus curiae*, in support of respondents' position.

Joseph F. O'Brien for Suffolk County Bar Association, *amicus curiae*, in support of respondents' position.

Copal Mintz for New York County Lawyers Association, *amicus curiae*, in support of respondents' position.

Joseph J. Perrini for Queens County Bar Association, *amicus curiae*, in support of respondents' position.

James Dempsey and *Paul L. Bleakley* for Westchester County Bar Association, *amicus curiae*, in support of respondents' position.

VAN VOORHIS, J. This is an appeal from a judgment of the Appellate Division, Third Department, affirming a summary judgment in favor of plaintiffs, entered upon an order of the New York County Special Term. The appeal in the Appellate Division was transferred to the Third Department by the First Department. The judgment under review is a declaratory judgment, determining that the Appellate Division, First Department, lacked power to adopt a rule relating to "Contingent Fees in Claims and Actions for Personal Injury and Wrongful death."* The record on appeal discloses that in recent

* The relevant portions of this rule are as follows:

"RULE 4. CONTINGENT FEES IN CLAIMS AND ACTIONS FOR PERSONAL INJURY AND WRONGFUL DEATH.

(a) In any claim or action for personal injury or wrongful death, whether determined by judgment or settlement, in which the compensation of claimant's or plaintiff's attorneys is contingent; that is, dependent in whole or in part upon the amount of the recovery, the receipt, retention or sharing by such attorneys, pursuant to agreement or otherwise, of compensation which is equal to or less than the fees scheduled below is deemed to be fair and reasonable. The receipt, retention or sharing of compensation which is in excess of such scheduled fees shall constitute the exaction of unreasonable and unconscionable compensation in violation of Canons 12 and 13 of the Canons of Professional Ethics of the New York State Bar Association, unless authorized by a written order of the court as hereinafter provided.

(b) The following is the schedule of reasonable fees referred to above, either

(1)

(A) Fifty per cent on the first one thousand dollars of the sum recovered,

(B) Forty per cent on the next two thousand dollars of the sum recovered,

(C) Thirty-five per cent on the next twenty-two thousand dollars of the sum recovered,

(D) Twenty-five per cent on any amount over twenty-five thousand dollars of the sum recovered; or

(2)

A percentage not exceeding thirty three and a third per cent of the sum recovered, if the initial contractual arrangement between the client and the attorneys so provides, in which event,

years contingent fee agreements have been filed with the Clerk of the First Department at an annual rate of 150,000 or more, of which upwards of 60% have fixed the attorneys' compensation at 50% of the amount of the recovery. Ninety-five per cent of the actions brought have been settled and not more than one and one-half per cent of all claims of this nature have gone to judgment after trial. Canon 13 of the Canons of Ethics of the

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the procedure hereinafter provided for making application for additional compensation because of extraordinary circumstances shall not apply.

(c) Such percentages shall be computed on the net sum recovered after deducting taxable costs and disbursements, and expenses of legal, medical, investigative, or other services properly chargeable to the claim or action. But for the following or similar items there shall be no deduction in computing such percentages: Liens, assignments or claims in favor of hospitals treating doctors, nurses, selfinsurers or insurance carriers.

(d) In the event that claimant's or plaintiff's attorneys believe in good faith that the foregoing schedule (1), because of extraordinary circumstances, will not give them adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the client and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the action had been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the Trial Term Calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to the justice presiding at the Trial Term Calendar part of the Supreme Court for the county in the First Judicial Department in which the attorneys filing the statement of retainer, pursuant to Rule 4-A, have an office. Upon such applications the justice in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in the foregoing schedule (1), provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the client and the attorneys. If the application be granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application."

New York State Bar Association provides: "A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness."

Taking cognizance of this situation, and noting that contingent fees are generally allowed in the United States because of their practical value in enabling a poor man with a meritorious cause of action to obtain competent counsel, the First Department adopted rule 4 with a preamble which concludes:

"When, however, the contingent fee reaches or approaches the 50 per cent level, it ceases to be a measure of due compensation for professional services rendered and makes the lawyer a partner or proprietor in the lawsuit. This is not a permissible professional relationship or a proper professional practice.

"The court considers the schedule adopted to allow ample compensation for the best efforts and services of competent counsel. It recognizes the possibility that extraordinary circumstances may exist in a particular case which would make the resulting compensation inadequate. The court will make special allowance in such cases and grant an application for larger compensation."

The complaint does not attack the reasonableness of this rule or its need. One of the plaintiff's moving affidavit states: "Whether the Rule is good or bad, necessary or unnecessary, desirable or undesirable, fair or unfair, responsive or not to the ethical and moral standards of the community, serving or damaging to professional and public interests, it is our contention that the Appellate Division was without power to adopt the Rule and is without power to enforce it."

Plaintiffs have not put in issue and have thus recognized for the purposes of the action that the rule is good, necessary, desirable, fair, responsive to the ethical and

moral standards of the community and serving professional and public interests. The power to adopt the rule is challenged, but the question of power has to be decided in the light of these circumstances. The issues before us have been drawn in this manner by the parties.

This rule was held to be invalid by the Third Department upon two grounds: (1) that it is inconsistent with section 474 of the Judiciary Law providing that the compensation of an attorney is governed by agreement, and (2) that the Appellate Division lacks power of discipline over attorneys regarding excessive fees except "in the individual case and after the event." Mention is not made in the Appellate Division's opinion of any other ground in the opinion at Special Term, such as that the rule is one of substantive law applying to only a segment of the State, or that disciplinary power over attorneys is unrelated to how much they charge their clients. Special Term did recognize that there may be such a thing as an "unconscionable" contingent fee agreement, but remarked that this must be decided as a question of fact whereas rule 4 is said to establish it as a matter of law.

Special Term's criticism of the rule on the ground that it establishes substantive law applicable to but one segment of the State will first be considered. If this comment were well founded, it would be a fatal defect—the Appellate Divisions cannot make substantive law by rules, and, acute as the problem is in the metropolitan counties, it could hardly be held that the attorney and client relationship is governed by different substantive law in New York City or in different parts of New York City. Upon the other hand, if rule 4 does not change the substantive legal relation between attorney and client, but merely supplies a procedure for determining on the basis of the real facts whether a lawyer is subject to discipline for charging more than he could collect in court from his client under law applicable to every part of the State, rule 4 was properly adopted under section 83 of the Judiciary

Law, which enables a majority of the Justices in each Department to make rules not inconsistent with any statute or rule of civil practice. The rules that have been adopted in the different Departments show that within these limits rules regarding procedure or disciplinary matters do not have to be uniform in all Departments, just as investigations of attorneys may be conducted in one Department without being conducted in others (*People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465).

It has been held by the judgment appealed from that rule 4 purports to alter the substantive law governing the relationship between attorney and client, and that in doing so it conflicts with section 474 of the Judiciary Law insofar as section 474 states that the compensation of an attorney is governed by agreement, express or implied. The Appellate Division, Third Department, and Special Term have both started with the assumption that rule 4 threatens disciplinary action against lawyers who make retainer agreements with clients that would otherwise be valid and enforcible under section 474 of the Judiciary Law. It follows from this false premise that the effect of rule 4 is to regulate fees of attorneys differently from the way in which they are regulated by statute. We find no basis for this assumption in the language of the rule, in its preamble, or in the evil which it proposes to remedy. The rule does not touch lawyers' fees except such as would be unenforcible in any event under section 474 of the Judiciary Law. It has been implied that rule 4 prevents lawyers from charging clients what they could otherwise legitimately charge, but that assumption overlooks that disciplinary action is not threatened except against exacting fees which could not legally be enforced in the absence of rule 4. Of course the threat of disciplinary action inhibits charging more than would be sanctioned under the rule, but that is not the test of its validity. That would have been true if the rule had simply announced that lawyers would be subject to disciplinary action for charging unconscionable fees.

If the rule is limited, as we interpret it, to making provision for disciplining attorneys for receiving more from their clients than could legally be collected under retainer agreements, even with the aid of section 474 of the Judiciary Law, the judgment appealed from is without foundation. The standard of decision in disciplining a lawyer or in announcing that he will be subject to discipline for violation of this rule, is whether he has charged his client more than the client is legally obligated to pay—that is to say, has charged what the courts will refuse to enforce as unconscionable in amount under a contingent fee agreement made with all the support which section 474 can supply.

It is not necessary to enter into an elaborate historical discussion of the origin of section 474 of the Judiciary Law. On the adoption of the Field Code (Code of Pro.; L. 1848, ch. 379), and under successor statutes culminating in the present section 474 of the Judiciary Law, contingent fee contracts ceased to be outlawed (are "not restrained by law"), but the courts have continued to exercise a wary supervision over them. The retention of such supervision by the courts was acknowledged by the New York State Bar Association in adopting Canon 13 of Ethics in 1909, in force ever since, which states that a contract for a contingent fee "should always be subject to the supervision of a court, as to its reasonableness." The State Bar Association did not act in ignorance or in contravention of the law of the State. Notwithstanding section 474, which was in effect during all of that time, few propositions are better established than that our courts do retain this power of supervision. Contingent fees may be disallowed as between attorney and client in spite of contingent fee retainer agreements, where the amount becomes large enough to be out of all proportion to the value of the professional services rendered. It matters little whether under such circumstances the formula be that the size of the fee becomes "unconscionable" or "unreasonable".

Each word means the same thing in this context. The special quality of a retainer contract is recognized by the cases holding that in spite of section 474 of the Judiciary Law the client may terminate it at any time, leaving the lawyer no cause of action for breach of contract but only the right to recover on *quantum meruit* for services previously rendered (*Matter of Dunn*, 205 N. Y. 398; *Martin* v. *Camp*, 219 N. Y. 170). Section 474 confers upon the lawyer no inalienable right to impose on his client, and a retainer agreement becomes unenforcible in some situations where a contract would be enforcible if the parties to it were not attorney and client. In *Ransom* v. *Ransom* (147 App. Div. 835, 849-850) the language of Justice NATHAN L. MILLER, later a Judge of this court, is quoted from *McCoy* v. *Gas Engine & Power Co.* (135 App. Div. 771, 772-773): "The word 'unconscionable' has frequently been applied to contracts made by lawyers for what were deemed exorbitant contingent fees. But by that nothing more has been meant than that the amount of the fee, standing alone and unexplained, may be sufficient to show that an unfair advantage was taken of the client or, in other words, that a legal fraud was perpetrated upon him. (*Morehouse* v. *Brooklyn Heights R. R. Co.*, 185 N. Y. 520.)" In *Matter of Friedman* (136 App. Div. 750, affd. 199 N. Y. 537), where a contract for 50% of a recovery in an accident case was held not to be fraudulent per se in all instances, the court added (136 App. Div. 751-752): "But the recovery may be such that what was in the first instance a fair contract becomes unfair in its enforcement. * * * the recovery may be such that the lawyer's retention of it would be unjustified and would expose him to the reproach of oppression and overreaching. He is an officer of the court and is judged as such, and technical contractual rights must yield to his duty as such officer." In the decisions on this subject, of which there are many, it is recognized throughout that there comes a point where the amounts to be received by attor-

neys under contingent fee contracts are large enough to be unenforcible under the circumstances of the case. Sometimes these charges are unconscionable as matter of fact and in other instances as matter of law (*Ford* v. *Harrington*, 16 N. Y. 285; *Place* v. *Hayward*, 117 N. Y. 487; *Matter of Fitzsimons*, 174 N. Y. 15; *Morehouse* v. *Brooklyn Heights R. R. Co.*, 185 N. Y. 520; *Matter of Friedman*, 136 App. Div. 750, affd. 199 N. Y. 537, *supra*; *Ward* v. *Orsini*, 243 N. Y. 123). In the case last cited, an eminent lawyer presented to this court for approval his printed contingent fee agreement in a case where he claimed the modest sum of $300, due to the settlement of an action without his knowledge or consent against the New York Central Railroad Company. The reasonable value of the legal services rendered was easily $300, which amounted to 50% under the signed retainer agreement. The opinion notes (p. 129) that "The defendant does not question the reasonableness of the fee." In writing for the court, Judge Pound was careful to avoid setting a precedent for other cases saying (p. 128): "It may well be that in a supposed case the amount received by the client would be so completely out of proportion to the value of the attorney's services that it would be unconscionable as matter of law to permit him to enforce his contract."

In *Morehouse* v. *Brooklyn Heights R. R. Co.* (*supra*, pp. 525-526) the court said: "An agreement to pay an attorney one-half of the recovery where the action was to recover a penalty of fifty dollars would not by any person be considered to be improper, but if it was for fifty thousand dollars it might be considered quite improper."

If the effect of the controversial portions of rule 4 is to provide for the disciplining of attorneys only where the contingent fee would be uncollectible in the full amount in an action between attorney and client under the general law of the State without reference to rule 4—which an

analysis of the rule indicates that it is—the rule is not subject to attack on the grounds that it is parochial or that it violates section 474 of the Judiciary Law. It is no answer to this reasoning that Surrogates' Courts and courts dealing with infants' claims or other cases may be vested with greater power to rule on lawyers' fees than merely to decide whether they are so large as to be unconscionable.

Except for what is called the graduated fee schedule, it is improbable that anyone would take exception to what has previously been stated, any more than objection was taken in court to the rules requiring the filing of contingent fee retainers, the special deposit of moneys collected by way of settlement or judgment, the furnishing of detailed statements to clients or the preservation of attorneys' records when rules concerning these were adopted in the First and Second Departments after the disclosures of the 1928 investigations (*Matter of Bar Assn. of City of New York*, 222 App. Div. 580; *Matter of Brooklyn Bar Assn.*, 223 App. Div. 149; *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, *supra*). Rules on those subjects prescribe in advance standards of conduct for attorneys in relation to their clients. There is no lack of power to do that, yet the reasoning of the opinions below would forbid it also. Rule 1-B of the First Department has long prescribed a standard of professional conduct directly respecting the compensation of attorneys, in that it prevents an attorney assigned as counsel for a defendant in a criminal case from accepting compensation except as authorized by an order of the court. That rule was attacked but was upheld in *Matter of Dresnick* (2 A D 2d 521). Section 308 of the Code of Criminal Procedure does not expressly authorize the Appellate Division to promulgate rule 1-B as respondents' brief indicates. It was done under the rule-making power. Rule 4-G makes a violation of the standards prescribed in the other special rules grounds for a finding of professional misconduct within the meaning of sub-

division 2 of section 90 of the Judiciary Law. There can be no objection to that.

Rule 4, *sub judice*, is essential in order to put on record the data necessary to be used as a foundation for taking disciplinary action. Even under plaintiffs' theory of action, no objection would lie against the rule if every lawyer filing a contingent fee retainer agreement were also required to file in his closing statement the amount of time he devoted to the case and an enumeration of the other facts underlying the elements entering into the value of the lawyer's services (*Randall* v. *Packard*, 142 N. Y. 47, 56). That would enable the court *after the event* and *in the individual case* to determine whether the lawyer was censurable for charging a contingent fee that was unconscionable as being out of all relation to the value of the work performed. The "fee schedule" in rule 4 dispenses with supplying that information where the agreed contingent fee is less than the percentages designated in the rule. If the stipulated fee is greater, the attorney is required to supply the information necessary on which to form a conclusion concerning the value of the professional services which have been rendered. This is merely supplying procedure whereby the lawyer may discharge his traditional burden of justifying his relations with his client where the circumstances prima facie call for explanation. Plaintiffs' objections reduce themselves to the fact that a declaratory determination is to be made regarding whether the amount of the contingent fee is censurable before rather than after the lawyer has received it. Rule 4 does not call for any determination until after the services rendered by the lawyer have been completed, nor even then unless the contingent fee exceeds the amounts in the schedule. The direction in the rule that the determination is to be made after the professional services have been completed is not without power, due to the circumstance that the question of professional conduct is to be decided before rather than after the fee has

been paid. Rules regulating professional conduct are "to prevent the continuance" of unworthy practices (*People ex rel. Karlin* v. *Culkin*, *supra*, p. 469. It is fairer and more considerate of the lawyer to determine the propriety of his conduct before he has received the fee.

If the consequence of the enforcement of this simple and practical disciplinary rule be to reduce he number of lawyers who are charging unconscionable contingent fees, that can furnish no basis on which to impugn the rule as a fee regulating measure. All regulation of improper practices has its consequences or should have in curtailing the practices. That is the purpose. The practice of charging unlawful fees is bound to be curtailed by the exercise of disciplinary powers, whether the fees are found to be unconscionable before or after they are paid.

Subdivision 2 of section 90 of the Judiciary Law (formerly numbered § 88, subd. 2) is thus described in the opinion by Chief Judge CARDOZO for the unanimous court in *People ex rel. Karlin* v. *Culkin* (*supra*, pp. 471-472): "'The supreme court shall have power and control over attorneys and counselors-at-law' (Judiciary Law, § 88, subd. 2). The first Constitution of the State declared a like rule in terms not widely different. Provision was there made that 'all attorneys, solicitors and counselors at law hereafter to be appointed, be appointed by the court and licensed by the first judge of the court in which they shall respectively plead or practice; and be regulated by the rules and orders of the said courts' (Constitution of 1777, § 27). What was meant by this provision that lawyers should be 'regulated by the rules and orders of the said courts?' Would the men who framed the Constitution of 1777 have been in doubt for a moment that a rule or order might be made whereby lawyers would be under a duty, when so directed by the court, to give aid by their testimony in uncovering abuses? We find the answer to these questions when we view the history of the profession in its home across the seas."

After describing the English origins of these provisions, Chief Judge Cardozo's opinion in *Karlin* summarizes the constitutional and legislative history in this State (p. 477): "With this background of precedent there is little room for doubt as to the scope and effect of the provision in the Constitution of 1777 that attorneys might be regulated by rules and orders of the courts. The provision was declaratory of a jurisdiction that would have been implied, if not expressed. The next Constitution, that of 1821, was silent as to the whole subject, containing no reference either to regulation or to appointment. Promptly, to avoid misapprehension, the Legislature passed a statute, the act of April 17, 1823 (L. 1823, ch. 182, § 19), which continued in the same words the provision formerly contained in the Constitution of 1777. There was a revision of the statutes in 1827 (Act of Dec. 4, 1827), in which the provision was omitted, but the courts continued to act upon the theory that the power of regulation was either inherent or implied (*Matter of H., an Attorney*, 87 N. Y. 521). The question does not now concern us whether the power may be withdrawn or modified by statute (*Matter of Cooper*, 22 N. Y. 67, 68). Instead of being withdrawn, it has been explicitly confirmed. In 1912, by an amendment of section 88 of the Judiciary Law (L. 1912, ch. 253), the jurisdiction was removed from the realm of implication. The earlier statutes were restored through a renewed declaration that lawyers are subject to the control and power of the court. We are back to the law as it existed in 1777."

These broad rule-making powers, so recently and explicitly upheld, are ample and flexible enough to include rule 4. The rule-making power is not limited to prescribing only for the specific case after the event. The idea that imposition by lawyers on their clients, oppressive and unconscionable fee agreements or similar conduct is beyond the rule-making power of the court has no shadow of foundation. The idea is frivolous that disciplinary

power over attorneys is unrelated to the exaction of excessive fees. Nor are the Appellate Divisions so helpless as to be denied the power of censure or of taking more incisive disciplinary action to curb the practice of excessive exactions against clients merely for the reason that the client himself has not elected to contest payment of the fee. The duty and function of the Appellate Divisions to keep the house of the law in order does not hinge upon whether clients, worn down by injuries, delay, financial need and counsel holding the purse strings of settlement, knowing little about law or lawyers, have had the stamina to resist in court by hiring other lawyers to be paid out of the other half of the recovery for defending against the first lawyer. This is not a picture of the courts and Bar as a whole in their relation to the public, but it accurately describes enough so that it cannot be said that the Appellate Division, First Department, has directed its attention without cause to correcting this situation. The independence of the Bar is not at stake in this action, nor are the best interests of the profession served by growing public resentment engendered by what this rule is designed to prevent. While liability in the negligence field has been continually expanding and the size and proportion of recoveries has mounted in constantly increasing progression, the risk of the lawyer under contingent fee agreements has been reduced and his remuneration magnified. On top of this the percentages of the clients' recoveries which this segment of the Bar insists upon the right to retain has been enlarged until in this one Judicial Department over 60% of the 150,000 contingent fee agreements filed each year provide that 50% of the recovery shall be paid to the lawyer.

Aware that when the contingent fee reaches or approaches 50% it ceases to be a measure of due compensation for professional services rendered and makes the lawyer a partner or proprietor in the lawsuit, the Appellate Division has sought a means of investigating and

checking what it deems to be an improper professional practice in the great majority of instances where it occurs. It cannot be held that reasonable and effective disciplinary action is not demanded in order to prevent the exaction of more than lawful charges in this huge field of controversy and litigation.

Where the amount of the claim is small, as the preamble to rule 4 states, the percentage charged may be greater than where the recovery is larger without rendering the fee unlawful. As a practical approach the rule sets forth a tentative schedule, subject to variation if the facts warrant, characterizing as unreasonable and unconscionable the collection of contingent fees in excess of 50% on the first $1,000 of the sum recovered, 40% on the next $2,000, 35% on the next $22,000, and 25% on any amount over $25,000 of the sum recovered.* The preamble states that the court considers that ample compensation for the best efforts and services of competent counsel will ordinarily be provided by the schedule. It is not necessary to take judicial notice that it does so in most instances, for the reason that plaintiffs have not disputed for the purposes of the action that the rule is fair, responsive to the ethical and moral standards of the community and serves professional and public interest. Moreover, what is of the utmost importance, these schedules are merely presumptive of what constitutes an exorbitant contingent fee in a particular case. The way is left open in any case to an attorney to come into court on a full showing of all the facts and circumstances, with opportunity to establish that these prima facie percentages do not indicate correctly that the stipulated contingent fee in his case is unlawful due to being unconscionable. The effect is to make a record in the individual case, to determine by the very *ad hoc* procedure which plaintiffs assert is the way to attack the problem, after the work of the lawyer has been

* Or, as an alternative, in excess of 33⅓% of the sum recovered

finished, whether the contingent fee claimed is lawful or unconscionable—that is to say, whether it is in such an amount as to be collectible in an action between attorney and client on the contingent fee retainer agreement. The language of the rule bears no token of an intention to censure the lawyer unless the charge to the client is so large in amount as to be uncollectible as between attorney and client. The scheduling of the graduated scale of percentages in the rule, fair as these percentages are conceded to be for the purposes of the action, concludes nobody. They are simply a procedural means of avoiding the necessity of calling upon every lawyer who files a contingent fee agreement to show what he has done in the case as a basis for determining whether the fee agreement is exorbitant. Plaintiffs have not denied that it is within the power of the Appellate Division to call on all lawyers who have collected contingent fees to do exactly that. They could not deny it in the face of the decision by this court in *People ex rel. Karlin v. Culkin* (248 N. Y. 465, *supra*). The matter here claimed to be wrong about the rule is that it calls upon the lawyer to make this showing (if his contingent fee exceeds the scheduled percentages) before rather than after collection of the fee. It could not be denied, even on plaintiffs' theory of the case, that excessive exactions by lawyers from their clients is a proper subject for investigation and disciplinary action. Unless the work were shortened by presuming that fees within specified limits were lawful, the volume of the task would be too great for any court effectively to perform. By the fee schedule the rule sifts out all except those to which special attention need be given. Some of those will prove to be legitimate and others illegitimate. They will not be branded either way even if they exceed the scheduled percentages, if the lawyer has made special application under the rule, until the court decides, and the attorney will not be censured unless he accepts a fee in an amount which has been found to be unconscionable.

There is no reason on account of which the Appellate Division could not proceed by this practical and equitable rule to attack this insistent problem. If a lawyer believes himself to be entitled to contingent fees in excess of the scheduled percentages, he can provide for them in his contingent fee contract without infraction of the rule, by stating in the retainer agreement that he believes in good faith that the scheduled percentages because of special or extraordinary circumstances will not give adequate compensation, and that application for greater compensation within the amounts provided by his contingent fee agreement will be made to the court at the conclusion of the litigation or on the settlement of the claim. The preamble to rule 4 acknowledges that the court "recognizes the possibility that extraordinary circumstances may exist in a particular case which would make the resulting compensation inadequate. The court will make special allowance in such cases and grant an application for larger compensation."

These scheduled percentages are, then, of merely presumptive effect, like a burden of proof which pertains to procedure and is not substantive law (*Wadsworth v. Delaware, L. & W. R. R. Co.*, 296 N. Y. 206, 212). It lay within the competence of the First Department under section 83 of the Judiciary Law to adopt rule 4 as a procedural aid in rendering effectual its disciplinary power over attorneys in the case of unlawful contingent fees. The so-called fee schedule merely determines where the burden of proof shall lie in the determination of the censurability of contingent fees in the individual case. Neither plaintiffs nor any segment of the Bar have a vested interest in the exaction of unlawful fees, which is all that this rule is fashioned to prevent, nor can they be heard to say that the Appellate Division is precluded from taking preventive measures for the reason that the client has decided not to litigate the fee. The contention that this is a fee-limiting measure is reduced to an argument

that lawyers cannot be disciplined for accepting fees which would be uncollectible in court, if the clients defended on the ground that they are so out of proportion to the value of the work as to be unconscionable.

The rule-making power of the Appellate Divisions in exercising their long-standing "power and control over attorneys and counsellors at law and all persons practicing or assuming to practice law" (Judiciary Law, § 90, subd. 2) has always been adapted to the exigencies of the times and to the ingenuity of lawyers who are trying to sail too close to the wind. We think that it extended to the adoption of rule 4. In view of the existence of subdivision 2 of section 90 of the Judiciary Law, it is not necessary to decide whether, as part of the Supreme Court which is vested by the Constitution with general jurisdiction in law and equity (N. Y. Const., art. VI, § 1), the Appellate Divisions possess similar powers over attorneys apart from statute.

The judgment appealed from should be reversed, and declaratory judgment entered in favor of the defendants and against plaintiffs, without costs.

Burke, J. (dissenting). The majority opinion suggests that we are to determine the question of the power of the Appellate Division, First Department, to promulgate rule 4 in the light of the concession by plaintiffs herein that the rule is reasonable, necessary and serves to advance the status of the profession. This reasoning is derived from a statement in the affidavit of one of the plaintiffs that the necessity and reasonableness of the rule are not in issue on this appeal. This statement is not, in terms, a concession, but was offered, as the affidavit states, solely for the purpose of limiting the issues in the action.

The sole issue before the court now is one of authority. However, since the majority finds it incumbent to defend the reasonableness of the rule, and its necessity, we should look into it with some degree of particularity.

The majority maintains this position despite the con-

clusions of Mr. Justice WASSERVOGEL, who, in reporting on the hearings held in connection with the rule, found that it was not necessary. Certainly his finding is not without basis in fact. Indeed, we find ample support for his position in the very records of the Appellate Division, First Department, itself. That court, as the preamble to rule 4 duly notes, has been opposed to contingent fee retainer contracts which provide that the fee shall be 50% of the recovery. As early as 1950—by the very admission of the Appellate Division, First Department, that court regarded such an agreement unconscionable per se (*Buckley v. Surface Transp. Corp.*, 277 App. Div. 224). Yet in the 10-year period 1949-1958 inclusive, when the number of lawyers practicing in the First Department increased sharply, the number of attorneys subjected to disciplinary action each year averaged but 14 in number. In the preceding 10-year period, the average number of attorneys subjected to disciplinary proceedings was 27.4 each year. Few, if any, attorneys were disbarred, suspended, censured or struck from the rolls because they had provided services in return for contingent fees in excess of 33⅓% of the amount of recovery.

Comparing the 1949-1958 period with the preceding 10-year period, we find that while the average number of contingent fee retainer contracts filed each year has doubled the average number of attorneys disciplined has been decreased by one half. The ratio is revealing; disciplinary proceedings have decreased in inverse proportion to the increase in the number of retainers filed. Indeed, the number of attorneys disciplined for extracting unconscionable fees have been so few in number that they are included in the records of the Appellate Division, First Department, concerning disciplinary matters under the heading "Miscellaneous".

Surely, we must assume that the First Department was not derelict in its statutorily mandated duty to discipline attorneys whose actions that court regarded as unconscionable or unreasonable. These contingent fee retainer

agreements were filed with the Clerk of the First Department; the contracts were readily available for the scrutiny of the court. Under subdivision 2 of section 90 of the Judiciary Law, the Appellate Division need not have waited until a dissatisfied client protested the attorney's fee. That court admittedly has the power to initiate proceedings, *sua sponte*, in individual cases where it regarded the fee charged to be unconscionable. Since we must assume that the First Department has discharged its duty to the People of this State as well as to the members of the Bar, we can only conclude that the disciplinary action in this area, infrequent though it might have been, was sufficient to meet the threat imposed by attorneys filing such contingent fee retainers.

To sustain the necessity of the rule, we are told that upwards of 150,000 contingent fee retainers were filed annually during the 10-year period, 1949-1958, and that approximately 60% or 90,000 agreements provide that the fee shall be 50% of the recovery. But the actual fees received by attorneys which may be found in the closing statements required to be filed by the First Department are not disclosed. There are no statistics to show the percentages reserved as attorneys' fees on actual recoveries. The number of closing statements filed each year is about 50,000. The differential between the number of closing statements and the number of retainers filed annually indicates that in many instances no settlement is reached, no recovery is had, and no fee is retained. One would imagine that, to obtain a true picture of the amount received by attorneys under contingent fee retainers, one should look at these closing statements, which would show actual figures, rather than the retainer agreement itself, which contains little information but does serve to inform the court that a claim has been asserted, and that a particular attorney has agreed to pursue the claim for a stipulated percentage of the recovery, if any.

Hence, an unbiased, objective appraisal of the relevant

factors indicates that there is a singular lack of evidence to show the necessity of the rule. Similarly, the reasonableness of the rule is open to question. Attorneys, as everyone else in this country, have been subjected to inflation. But it is argued that plaintiffs' verdicts have similarly increased and, hence, contingent fees are much too high. The American Bar Association, however, has published studies indicating that compensation for attorneys has not increased correspondingly over these inflationary years as has the remuneration of other professions as medicine and dentistry. Also ignored is the fact that the courts themselves have additionally increased the burgeoning costs of an attorney by requiring him to file innumerable papers to serve the orderly administration of justice.

The rule fails to consider that an attorney, without initial cost to a client, makes available to that client his talents, his office facilities and his secretarial assistance to process the client's claim. An attorney may not be a partner in the claim, but he assumes a great risk in processing the claim. His money and time, which he has expended, may produce no return.

Rule 4 here fails to take into account, at the very beginning that the case may be tried and retried, that appeals may be taken, before a judgment may be collected. And in some instances, after all these services have been rendered, there is no money judgment for the plaintiff. These are the hazards which an attorney assumes when he accepts a client on a contingent fee basis. How can a court be so omniscient to state that, at the outset, before the greater part of the work has been done, that a particular percentage is unreasonable under any and all circumstances? Under some circumstances, it is quite conceivable that a contingent retainer fee of 33⅓% of the recovery may be unreasonable. It may very well be that fees in excess thereof should be the exception rather than the rule. But the reasonableness of the fee—regardless

of the percentage chosen—can only be determined in an *ad hoc* proceeding, after the event.

But the reasonableness of the rule and the necessity of the rule are not in issue here. And rather than base this opinion—as has the majority based its opinion—upon an assumption which is rebutted by all the factual data in the Appellate Division archives, we examine the power to enact the rule not in the light of necessity and reasonableness, but from the history which has culminated in the acceptance of this rule by only one of the four departments of the Appellate Division.

The hearings held immediately prior to the promulgation of rule 4 did not consider the power of the Appellate Division to promulgate the rule, but dealt with its necessity. But other committees, formed on other occasions, have considered this question. Their conclusions that the courts do not have this power to regulate attorneys' fees, while not conclusive, nor binding upon this court, are certainly persuasive authority, and are entitled to great weight. (Association of Bar of City of New York Reports, Vol. 65, Set D No. 475 [1938 Annual Reports, pp. 295-296]; Vol. 80, No. 649 [1943]; Bronx County Bar Assn. Report in Library, Assn. of Bar of City of New York, fol. n p 1940 in folio pam. v. 245; 31 N. Y. State Bar Assn. Rep. 124 [1908].)

The Association of the Bar of the City of New York, which has before this court so militantly and ably defended the power of the Appellate Division to promulgate this rule, had concluded after investigation, hearings and mature thought not once, but at least twice, that the court's power to regulate contingent fees was circumscribed by law. In 1938, a special committee of that honored association, in its reports, after discussing the proposition that "there is little practical scope left for the argument that the courts retain any power in this field apart from fraud and overreaching" further stated: "However that may be, the lines of judicial and legislative doc-

trine are too firm by this time to sustain the hope of successful modification by the judiciary alone. There is definite and unquestioned need for a new deposit of authority in our courts, and this deposit of authority must come from new legislation." (Annual Reports of Association of Bar of City of New York [1938], pp. 295-296.)

And again in 1943, another committee of the Association of the Bar reviewed the problem. And again the committee concluded that the broad scope of section 474 of the Judiciary Law imposed restraints upon judicial regulation of contingent fees. And again the committee suggested remedial legislation: "We can only point the way in the hope that the legislature, where many of our professional brethren labor, may also recognize the evil and give to the courts the power to apply some remedy." (Association of Bar of City of New York Reports, Vol. 80, No. 649-[1943].)

This view—that the power to regulate contingent fees is not vested in the courts—is not new. Indeed, as far back as 1908, a committee of the State Bar Association deplored the abuses of the contingent fee by attorneys and recommended that control of such fees be specifically vested in the courts. (31 New York State Bar Assn. Rep. 121.) The Legislature, however, rejected this proposal.

The report is significant in that it clearly demonstrates that under the statutory law of this State which in this area has remained unimpaired since that time—there was a recognition that courts did not have the power to regulate fees. Further, it is also significant since it shows that the Legislature did not think that there were abuses, or that the courts should regulate fees. And this has been the thinking of the Legislature, since that time, for they have continually rejected such bills as would vest power in the courts to regulate contingent fees (see, e. g., N. Y. Senate Bill, Sen. Int. No. 419, Print No. 457, 1941 Sess.).

Special Term and the unanimous Appellate Division, Third Department, have similarly found rule 4 to regu-

late fees, and have similarly concluded that the Appellate Division, First Department, lacked the power to enact such a rule.

The majority opinion states: "The Appellate Division, Third Department, and Special Term have both started with the assumption that rule 4 threatens disciplinary action against lawyers who make retainer agreements with clients that would otherwise be valid and enforcible under section 474 of the Judiciary Law. It follows from this false premise that the effect of rule 4 is to regulate fees of attorneys differently from the way in which they are regulated by statute. We find no basis for this assumption in the language of the rule, in its preamble, or in the evil which it proposes to remedy. The rule does not touch lawyers' fees except such as would be unenforcible in any event under section 474 of the Judiciary Law."

The false premise to which the majority refers is not the threatened disciplinary action, for rule 4 obviously exposes any attorney charging, without court permission, a contingent fee in excess of the schedule set forth to disciplinary action. The false premise, according to the majority opinion, upon which the courts below rested their decisions, is that rule 4 prohibits contracts which are enforcible under section 474 of the Judiciary Law, which states that "[t]he compensation of an attorney * * * for his services is governed by agreement, express or implied, which is not restrained by law". The majority says that this assumption is not true. Or rather, it assumes that there is no basis for this assumption. The rule proscribes fees in excess of 33⅓% of the amount of the recovery. Yet there are cases in this court, of which the majority is aware because it has cited them continually to sustain its position, where this court has sustained a 50% contingent fee! (*Ward v. Orsini*, 243 N. Y. 123; *Morehouse v. Brooklyn Heights R. R. Co.*, 186 N. Y. 520; *Matter of Fitzsimmons*, 174 N. Y. 15, 23-25.)

The only basis upon which the majority can sustain its decision is this: "If the rule is limited, as we interpret it, to making provision for disciplining attorneys for receiving more from their clients than could legally be collected under retainer agreements even with the aid of section 474 of the Judiciary Law, the judgment appealed from is without foundation."

This belated attempt to harmonize rule 4 with section 474 of the Judiciary Law does not survive analysis. As we have shown, the cases indicate that a 50% contingent fee may be enforced under section 474 of the Judiciary Law; it may not be enforced under the present rule 4, unless prior approval of the First Department is obtained. A court cannot predict a priori the reasonableness of a fee to be charged in the event of recovery, where there has been no recovery and, indeed, where there has been little work done in processing the claim.

We cannot conclude that the rule describes as censurable conduct that which has always been censurable. If it has been previously clear that contingent fees in excess of the recommended schedules were censurable, there would hardly be need for the Appellate Division to hold extensive hearings and promulgate a merely repetitive rule. Further, the premises that the rule proscribes conduct by attorneys which has always been censurable is belied by the fact that only in rare instances has the First Department censured attorneys for such conduct.

There is another evil inherent in this type of rule. The power to promulgate the rule necessarily implies the power to amend the rule. Admittedly, the Appellate Division, First Department, totally lacks the power to promulgate a rule which states that any percentage agreement would be unreasonable, since this would clearly contravene section 474 of the Judiciary Law, even if attorneys were granted the privilege to have their compensation fixed by a court upon proper application. While it does not seem likely that the First Department would test the extent of

its power to that extreme, it can conceivably lower its present recommended schedule of fees to such a lower percentage that it would not be economically feasible for attorneys to enter into such contingent fee contracts. The other equally unpalatable alternative for attorneys would then be to contract for fees in excess of the prescribed rates and face the certainty of disciplinary action.

The innate mischief of the rule, and the conclusion that it does, in fact, fix fees, is apparent when the rule is carried to its logical extremes. Why, for instance, is a contingent fee of 33⅓% of the recovery fair and conscionable under all the circumstances, but a contingent fee of 34% unfair and unconscionable under all the circumstances? The reasonableness of the fee is not determined solely on the amount charged, but also by the quality of the services rendered in light of the circumstances of the particular case. (*Ward* v. *Orsini*, 243 N. Y. 123, *supra*; *Matter of Friedman*, 136 App. Div. 750, aff'd. 199 N. Y. 537; *Morehouse* v. *Brooklyn Heights R. R. Co.*, 185 N. Y. 520, *supra*; *Matter of Fitzsimons*, 174 N. Y. 15, *supra*; *Barry* v. *Whitney*, 3 Sandf. 696.)

Since then the premise that rule 4 prohibits contracts which would be enforcible under section 474 of the Judiciary Law is correct, as I have attempted to indicate, it follows that rule 4 in effect fixes contingent fees. To conclude otherwise, from reading the rule, would be sheer sophistry.

Rule 4, as we have shown, conflicts with section 474 of the Judiciary Law. From this statement, several corollaries may be derived. The first is that the Appellate Division, First Department, may not promulgate a special rule in contravention of a specific statute even under the grant of power under section 83 of the Judiciary Law. (*Chase Watch Corp.* v. *Heins*, 284 N. Y. 129; *Moot* v. *Moot*, 214 N. Y. 204; *Ackerman* v. *Ackerman*, 123 App. Div. 750, aff'd. 200 N. Y. 72; *Gleason* v. *Stedwell*, 64 N. Y. 120.) Another corollary is that, in usurping power not granted to it by the Legislature, the court has enacted legislation

contrary to the method prescribed by the State Constitution.

Further, the rule changes the substantive law of the State for one particular group of lawyers practicing in one particular area of the State. In *Matter of Mayor of City of New York* (19 Barb. 588) local rules of the General Term of the Supreme Court in the First Judicial District, permitting the court to fix attorneys' fees in street opening proceedings, were held to be void. The court said (pp. 491-492) that the rules, if legal, "are general rules applicable to all cases of like character. Therefore, the general term in a district had no legal power to make them; for which reason, those rules are void and nugatory."

Rule 4 suffers from the same infirmity. If legal, it should be applicable to all cases of like character, not only to cases where the attorney has his office in the First Department, or to cases which are tried in the First Department. Hence, the Appellate Division, First Department, has no power under section 83 of the Judiciary Law to promulgate this "special rule". Hence, lawyers in one part of the State may seek enforcement of a contingent fee retainer in the courts of law but, in the First Department, an action may not be brought if the compensation provided for in the agreement exceeds the limits provided for in rule 4. Such discrimination between citizens of the State with regard to their access to our courts is a violation of the due process and equal protection clauses of the State and Federal Constitutions. (See *Gregonis* v. *Philadelphia & Reading Coal & Iron Co.*, 235 N. Y. 152, 159.)

The judgment appealed from should be affirmed, without costs.

FROESSEL, J. (dissenting). I concur with Judge BURKE for affirmance. Much has been said in this case that is completely irrelevant to the sole issue presented, namely: Did the Appellate Division of the First Department have the *power* to adopt rule 4 insofar as it provides that contingent fees equal to or less than the percentages fixed by it are "fair and reasonable", whereas those in excess "shall *constitute* the *exaction of unreasonable and unconscionable* compensation"? (Emphasis supplied.)

At the outset it may be noted that the very body charged by law (Judiciary Law, § 90) with disciplining attorneys has created by its own rule a presumption of guilt of unconscionable conduct, in the nature of a prior restraint, contrary to the express provisions of section 471 of the Judiciary Law. The challenged rule is not one of procedure. It interferes with the freedom of contract and impairs the obligation of existing contracts between attorneys and their clients, by arbitrarily fixing percentage fees, as to the amounts of which in many cases reasonable men might disagree.

We are not concerned here with what Edward I did with the courts and lawyers in 1292, for he assumed to regulate the lives of all his subjects. We live under an entirely different form of government today, under a written Constitution with its three separate branches of government (U. S. Const. arts. I, II, III; N. Y. Const., arts. III, IV, VI), each operating in its own sphere. And a court's first duty is to obey the law itself, no matter how well intentioned it may be in effecting a change.

From the earliest days, the Legislature of this State has exercised exclusive power with respect to attorneys' fees. In 1848, all statutes regulating the fees of attorneys or "restricting or controlling the right of a party to agree with an attorney * * * for his compensation" were abolished. It was then provided that "The measure of such compensation shall be left to the agreement, express or implied, of the parties" (L. 1848, ch. 379, § 258). In 1876, the precise language of the first clause of what is

now section 474 of the Judiciary Law was adopted, namely, "The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law" (L. 1876, ch. 448, §66).

In 1908, after an investigation into the abuses of contingent fees, the New York State Bar Association recommended an amendment of the law to allow a court to pass upon the reasonableness of contingent fee contracts in negligence cases and to reduce the attorney's compensation when it was found excessive (31 New York State Bar Assn. Rep. 105-106, 136). This proposal was rejected by the Judiciary Committee of the Assembly, which thought it was an "effort to invade a constitutional right" between lawyer and client (32 New York State Bar Assn. Rep. 194). In 1938, as Judge BERKE points out, a committee of the Association of the Bar recognized that "this deposit of authority must come from new legislation". (Annual Reports of Association of Bar of City of New York [1938], p. 296.).

The case law under section 474 of the Judiciary Law clearly indicates that the function of the court is to determine whether the facts surrounding the agreement in any given case show that the attorney took advantage of the confidential relationship or perpetrated a fraud upon his client (*Wilkinson* v. *Hoecker*, 248 N. Y. 480, 488-490; *Ward* v. *Orsini*, 243 N. Y. 123, 127-128; *Matter of Reistetd*, 227 N. Y. 137, 140; *Ransom* v. *Cutting*, 188 N. Y. 447, 450; *Morehouse* v. *Brooklyn Heights R. R. Co.*, 185 N. Y. 520, 526, reaffd. after new trial 123 App. Div. 680, affd. 195 N. Y. 537; *Matter of Fitzsimons*, 174 N. Y. 15, 23-24; *Matter of Peters* [*Bachmann*], 271 App. Div. 518, 523, mod. on other grounds 296 N. Y. 974; *Matter of Sasson*, 231 App. Div. 524, 526; *Matter of Liebergall*, 189 App. Div. 681, 684; *Matter of Lessig*, 165 Misc. 706, 708 [in which the attorney claimed that an agreement was unconscionable to *his* disadvantage]).

In the absence of such showing, we have repeatedly held

that under section 474 of the Judiciary Law the measure of an attorney's compensation is fixed by his agreement with his client, unless otherwise provided by law (as, e. g., in Judiciary Law § 474 [as to infants]; Surrogate's Court Act, § 231-a; Real Property Law, §§ 122, 122-a; General Corporation Law, §§ 63-68; Workmen's Compensation Law, § 142, subd. 1), and that a court may not disregard that agreement and substitute its own judgment as to what it believes to be the appropriate compensation for the attorney's services. Nevertheless, the majority is now approving a rule of the Appellate Division which in effect overrules our decisions.

There is neither constitutional nor statutory authority for the enactment of rule 4. While section 83 of the Judiciary Law provides that "A majority of the justices of the appellate division in each department, by order of such majority, shall have power, from time to time, to adopt, amend or rescind any special rule for such department", this may only be done when "not inconsistent with any statute or rule of civil practice". By the same statute, the Justices of the Appellate Division are empowered to amend the Rules of Civil Practice only if "not inconsistent with any statute". When the Legislature declared that the compensation of an attorney for his services is governed by agreement, express or implied, which is not restrained by law, the Appellate Division had no right to enact a rule to the contrary, at the same time creating a presumption of guilt of unconscionable conduct because a lawyer may have contracted for a larger percentage (such as 35% or 40%) than the rule prescribes as reasonable for his services in a personal injury action.

A great deal is said in the prevailing opinion and in appellant's brief about the desirability of rule 4, but, as I have already indicated, these considerations are completely irrelevant in our determination of the Appellate Division's power. In McKinney's Consolidated Laws of New York (Book 1, Statutes, § 73, p. 150), "Avoidance

of judicial legislation", it is said (citing numerous cases): "The Constitution of this state vests the legislative power in the Senate and Assembly [N. Y. Const., art. III, § 1], and that the courts may not divest or usurp this power has been announced so frequently and in such varying language as to defy complete repetition. Thus it is said that courts may not make, change, amend, or repeal a statute, since their function is to interpret, declare, and enforce the law; not to make it. No matter what disastrous consequences may result from following the expressed intent of the Legislature, the Judiciary cannot avoid its duty."

Whether such usurpation of power is effected by rule or by the interpretation and construction of statutes, the result is the same. Section 474 and its predecessor have been on the statute books for well over a century and, despite efforts to secure an amendment thereof, the Legislature has thus far declined to make a change. This does not authorize the courts to usurp its power, for to "supply omissions transcends the judicial function". (*Iselin* v. *United States*, 270 U. S. 245, 251). "A plea that a statute imposes inconvenience or hardship upon a litigant should be addressed to the Legislature; we may not usurp its functions by legislating judicially (*United States* v. *Carolene Products Co.*, 304 U. S. 144)" (*People* v. *Friedman*, 302 N. Y. 75, 79); and "'Nothing is more certain than that beneficent aims, however great or well directed, can never serve in lieu of constitutional power.' (*Carter* v. *Carter Coal Co.*, 298 U. S. 238, 291.)'" (*Matter of Fink* v. *Cole*, 302 N. Y. 216, 225.)"

The judgment appealed from should be affirmed, without costs.

Chief Judge Conway and Judges Desmond, Dye and Fuld concur with Judge Van Voorhis; Judges Froessel and Burke dissent in separate opinions.

Judgment reversed, without costs, and the matter remitted to Special Term for further proceedings in accordance with the opinion herein.

APPENDIX B

Special Rules of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department

Rule 1. Application. These special rules shall apply to attorneys and counselors at law who have their offices in the First Judicial Department. If the office of an attorney is not within the First Judicial Department he shall, nevertheless, be subject to these rules upon the commencement of an action or proceeding in the First Judicial Department, and shall file the statement of retainer as required by Rule 1-A of these rules within thirty days thereafter.

RULE 4—CONTINGENT FEES IN CLAIMS AND ACTIONS FOR PERSONAL INJURY AND WRONGFUL DEATH

(a) In any claim or action for personal injury or wrongful death, whether determined by judgment or settlement, in which the compensation of claimant's or plaintiff's attorney is contingent, that is, dependent in whole or in part upon the amount of the recovery, the receipt, retention or sharing by such attorneys, pursuant to agreement or otherwise, of compensation which is equal to or less than the fees scheduled below is deemed to be fair and reasonable. The receipt, retention or sharing of compensation which is in excess of such scheduled fees shall constitute the exaction of unreasonable and unconscionable compensation in violation of Canons 12 and 13 of the Canons of Professional Ethics of the New York State Bar Association, unless authorized by a written order of the court as hereinafter provided.

(b) The following is the schedule of reasonable fees referred to above: either,

(1)

(A) Fifty per cent. on the first one thousand dollars of the sum recovered,

(B) Forty per cent. on the next two thousand dollars of the sum recovered,

(C) Thirty-five per cent. on the next twenty-two thousand dollars of the sum recovered,

(D) Twenty-five per cent. on any amount over twenty-five thousand dollars of the sum recovered; or

(2)

A percentage not exceeding thirty-three and a third per cent. of the sum recovered, if the initial contractual arrangement between the client and the attorneys so provides, in which event the procedure hereinafter provided for making application for additional compensation because of extraordinary circumstances shall not apply.

(c) Such percentages shall be computed on the net sum recovered after deducting taxable costs and disbursements, and expenses for legal, medical, investigative, or other services properly chargeable to the claim or action. But for the following or similar items there shall be no deduction in computing such percentages: Liens, assignments or claims in favor of hospitals, treating doctors, nurses, selfinsurers or insurance carriers.

(d) In the event that claimant's or plaintiff's attorneys believe in good faith that the foregoing schedule (1),

because of extraordinary circumstances, will not give them adequate compensation, application for greater compensation may be made upon affidavit, with written notice and an opportunity to be heard to the client and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the action had been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the Trial Term Calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to the justice presiding at the Trial Term Calendar part of the Supreme Court for the county in the First Judicial Department in which the attorneys filing the statement of retainer, pursuant to Rule 4-A, have an office. Upon such application, the justice in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in the foregoing schedule (1), provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the client and the attorneys. If the application be granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application.

(e) Every attorney, upon receiving, retaining or sharing any sum as contingent compensation in any claim or action subject to this rule, whether such compensation be determined under the foregoing schedule or be fixed by application to a justice, within fifteen days after such receipt, retention or sharing shall serve in the manner required by Rule 4-B on the client and file in the office of the clerk of the Appellate Division, a closing statement which shall include the following information:

(1) The date when, pursuant to Rule 4-A, the state-

ment of retainer was filed in the office of the clerk of the Appellate Division; and the date when the claim or action was disposed of; whether by settlement or judgment; and whether before, during or after trial;

(2) The gross amount of the recovery;

(3) The taxable costs and disbursements;

(4) An itemized statement of the liens, assignments, claims and expenses charged against the client, together with any amounts paid by the attorney to others, listing their names and addresses;

(5) The net amount of the recovery actually received by the client;

(6) The amount of the compensation actually received or retained by the attorney;

(7) Whether such compensation has been fixed under the schedule of this rule or by application to a justice on the ground of extraordinary circumstances;

(8) If the compensation was fixed by a justice, then a copy of his order shall be set forth in the closing statement or annexed to it.

(f) A joint closing statement may be served and filed in the event that more than one attorney receives, retains or shares in the contingent compensation in any claim or action.

(g) Provided, however, that the provisions, generally, of this rule shall not apply to an attorney retained as counsel in a claim or action for personal injury or wrongful death by another attorney, such other attorney himself not otherwise being subject to the provisions of this

rule in such claim or action, except that the provisions pertaining to the making, serving and filing of closing statements contained in subdivision (e), paragraphs (1) through (6), and subdivision (f), shall apply.

(h) Provided, further, that nothing contained in this rule, including the schedule therein included, shall be deemed applicable to the fixing of compensation for attorneys representing infants or other persons, where the statutes or rules provide for the fixation of such compensation by the court.

APPENDIX C

Order of Reversal by New York Court of Appeals

STATE OF NEW YORK

IN COURT OF APPEALS

Pleas in the Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the 28th day of May, A. D. 1959, before the Judges of said Court.

Witness, HON. ALBERT CONWAY, *Chief Judge, presiding.*

RAYMOND J. CANNON, Clerk.

Remittitur May 28–1959.

No. 372

HARRY A. GAIR & ors.,

Respondents,

vs.

THE HONORABLE DAVID W. PECK & ors., individually and as Justices of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department,

Appellants.

Be it remembered, that on the 8th day of December in the year of Our Lord one thousand nine hundred and fifty-eight, The Honorable David W. Peck & ors., indi-

vidually and as Justices of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department, the appellants in this cause, came here unto the Court of Appeals, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Harry A. Gair, & ors., the respondents in said cause, afterwards appeared in said Court of Appeals by Howard Hilton Spellman, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. James O. Moore, Jr., of counsel for the appellants, and by Mr. Howard Hilton Spellman, of counsel for the respondents, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, without costs, and the matter remitted to Special Term for further proceedings in accordance with the opinion herein.

AND IT WAS FURTHER ORDERED, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be reversed, without costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and pro-

vided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

S/ Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, May 28, 1959.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

S/ Raymond J. Cannon
Clerk

(Seal of the Court of Appeals)

Order Denying Reargument and Amending Remittitur by New York Court of Appeals

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the eighth day of July A. D. 1959.

Present, HON. ALBERT CONWAY, *Chief Judge, presiding.*

Mo. No. 361

HARRY A. GAIR & ors.,

Respondents,

vs.

THE HONORABLE DAVID W. PECK & ors., individually and as Justices of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department,

Appellants.

A motion for reargument and to amend the remittitur in the above cause having been heretofore made upon the part of the respondents herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

FURTHER ORDERED, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby

is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States viz.: Respondents contended that the promulgation and threatened enforcement of Rule 4 of the Special Rules of the Appellate Division, First Judicial Department, of the Supreme Court of the State of New York deprived and continue to deprive respondents of liberty and property without due process of law and denied and continue to deny respondents the equal protection of the laws, all in violation of the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals held that there was no such deprivation or denial."

And the Supreme Court, New York County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

S/ Gearon Kimball
Deputy Clerk

(Seal of the Court of Appeals)

Judgment of New York Supreme Court on Amended Remittitur from New York Court of Appeals

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York at the County Courthouse, No. 60 Centre Street, Borough of Manhattan, City of New York on the 18th day of August, 1959.

Present: Hon. John L. Flynn, *Justice.*

Judgment on Remittitur of Court of Appeals.

Index #4063/1957

Harry A. Gair, Emile Z. Berman, Robert C. Kilroe, David C. Broderick and John J. Tullman,

Plaintiffs,

—against—

The Honorables David W. Peck, Charles D. Breitel, Bernard Botein, Benjamin J. Rabin, Martin M. Frank, Francis L. Valente and James B. M. McNally, individually and as Justices of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department.

Defendants.

The above named defendants, The Honorables David W. Peck, Charles D. Breitel, Bernard Botein, Benjamin J. Rabin, Martin M. Frank, Francis L. Valente and James B. M. McNally, individually and as Justices of the Appellate Division of the Supreme Court of the State of New

York in and for the First Judicial Department, pursuant to permission granted by the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department, dated May 19, 1958, having appealed to the Court of Appeals of the State of New York from the judgment entered in the office of the Clerk of the County of New York on April 3, 1958, predicated on the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department, entered in the office of the Clerk of that Court on March 27, 1958, affirming the order and judgment herein of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on June 19, 1957, which granted plaintiffs' motion for summary judgment in all respects, struck out the answer of the defendants and declared and adjudged the rights and other legal relations of the parties as follows:

> "That the defendants and the court in which they serve are without power to promulgate and enforce Rule 4 of the Special Rules of the Appellate Division, First Judicial Department, as adopted on September 21, 1956 and as amended on December 19, 1956, except subdivisions (e) and (f) thereof and that, therefore, the said Rule 4 except the said subdivisions, is void, invalid and of no effect. That plaintiffs shall have the right to disregard the same and that plaintiffs are not bound by any legal relation to the said Rule except the said subdivisions or the necessity of its observance.";

and said appeal having been duly argued at said Court of Appeals, and after due deliberation of the Court of Appeals, that Court, two Judges dissenting, having filed its opinion and made an order dated May 28, 1959, by which it ordered and adjudged that the judgment appealed from as aforesaid be reversed without costs and directed that the proceedings herein be remitted to the Special

Term of the Supreme Court, New York County, for further proceedings in accordance with its opinion so rendered, there to be proceeded upon according to law; and the remittitur from said Court of Appeals as amended by its order of July 8, 1959, having been filed herein; and the Court of Appeals by its aforesaid order of July 8, 1959, having certified the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Respondents contended that the promulgation and threatened enforcement of Rule 4 of the Special Rules of the Appellate Division, First Judicial Department, of the Supreme Court of the State of New York deprived and continue to deprive respondents of liberty and property without due process of law, and denied and continue to deny respondents the equal protection of the laws, all in violation of the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals held that there was no such deprivation or denial.";

Now on reading and filing the remittitur from said Court of Appeals herein, and upon motion of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants herein, it is hereby

ORDERED AND ADJUDGED that the order and judgment of said Court of Appeals be and the same hereby are made the order and judgment of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that said judgment herein appealed from entered in the office of the Clerk of the County of New York on April 3, 1958 predicated on the said order of affirmance made by the Appellate Division of the Supreme Court in and for the Third Judicial Department, entered in the office of the Clerk of that Court on March 27, 1958, be and the same hereby is reversed and vacated; and it is further

ORDERED, ADJUDGED AND DECREED that the order and judgment herein of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York, on June 19, 1957, affirmed by the aforesaid order of the Appellate Division of the Supreme Court in and for the Third Judicial Department, entered in the office of the Clerk of that Court on March 27, 1958, which granted plaintiffs' motion for summary judgment in all respects, struck out the answer of the defendants and declared and adjudged the rights and other legal relations of the parties as follows:

> "That the defendants and the court in which they serve are without power to promulgate and enforce Rule 4 of the Special Rules of the Appellate Division, First Judicial Department, as adopted on September 21, 1956 and as amended on December 19, 1956, except subdivisions (e) and (f) thereof and that, therefore, the said Rule 4 except the said subdivisions, is void, invalid and of no effect. That plaintiffs shall have the right to disregard the same and that plaintiffs are not bound by any legal relation to the said Rule except the said subdivisions or the necessity of its observance.",

be and the same hereby is reversed and vacated; and it is further

ORDERED, ADJUDGED AND DECREED, pursuant to the Civil Practice Act, § 473, that judgment be and the same hereby is entered in favor of the defendants, The Honorables David W. Peck, Charles D. Breitel, Bernard Botein, Benjamin J. Rabin, Martin M. Frank, Francis L. Valente and James B. M. McNally, individually and as Justices of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department, and against the plaintiffs, Harry A. Gair, Emile Z. Berman, Robert C. Kilroe, David C. Broderick and John J. Tull-

man, declaring the rights and other legal relations of said parties as follows:

1. That the defendants had the power pursuant to the Judiciary Law of the State of New York, §§ 83 and 90 to make, promulgate and enforce Rule 4 of the Special Rules of the Appellate Division of the Supreme Court, First Judicial Department, relating to "Contingent Fees in Claims and Actions for Personal Injury and Wrongful Death", as adopted on September 21, 1956 and as amended on December 19, 1956. Such Rule 4 is, therefore, valid and effective in all of its provisions and the plaintiffs are subject thereto and bound thereby.

2. That the aforesaid Rule 4 of the Special Rules of the Appellate Division of the Supreme Court, First Judicial Department, as amended, does not deprive the plaintiffs of due process of law or of the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

3. That the aforesaid Rule 4 of the Special Rules of the Appellate Division of the Supreme Court, First Judicial Department as amended, is hereby construed to mean that it does not deprive the plaintiffs of the right to retain any fee which they would be entitled to collect in an adversary proceeding in the absence of such rule.

Enter

J. L. F.
J. S. C.

James McGuirk
Clerk

FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 28 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 544

HARRY A. GAIR, EMILE Z. BERMAN, ROBERT C. KIEROF, DAVID C. BRODERICK and JOHN J. TULLMAN,

Appellants,

The Honorables DAVID W. PECK, CHARLES D. BREITEL, BERNARD BOTEIN, BENJAMIN J. RABIN, MARTIN M. FRANK, FRANCIS L. VALENTE and JAMES B. M. McNALLY, individually and as Justices of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department,

Appellees.

MOTION TO DISMISS APPEAL

LOUIS J. LEFKOWITZ,
Attorney General of New York State,
Attorney for Appellees,
80 Centre Street,
New York 13, N. Y.

Of Counsel:
JAMES O. MOORE, JR.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

HARRY A. GAIR, EMILE Z. BERMAN, ROBERT C. KILROE, DAVID C. BRODERICK and JOHN J. TULLMAN,

Appellants,

v.

The Honorables DAVID W. PECK, CHARLES D. BREITEL, BERNARD BOTEIN, BENJAMIN J. RABIN, MARTIN M. FRANK, FRANCIS L. VALENTE and JAMES B. M. MCNALLY, individually and as Justices of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department,

Appellees.

MOTION TO DISMISS APPEAL

The above named appellees, David W. Peck, Charles D. Breitel, Bernard Botein, Benjamin J. Rabin, Martin M. Frank, Francis L. Valente and James B. M. McNally, individually and as Justices of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, hereby move this Court, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, for an order dismissing the above captioned appeal on the ground that the appeal does not present a substantial federal question.

Statement of the Case

This is an action for a declaratory judgment instituted in the courts of New York State against the presiding Justice and the six associate Justices of the Appellate Division of the Supreme Court for the First Judicial Department. The appellants, all of whom are attorneys engaged in the practice of their profession in the First Judicial Department of New York State, seek a judgment that the Court is without power to promulgate and enforce Rule 4 of the Special Rules of the Appellate Division, First Department, governing the conduct of attorneys practicing in that department.

In New York State the historic and traditional judicial power and control over attorneys has for many years been vested by statute in the Appellate Divisions of each of the four Judicial Departments (New York Judiciary Law, § 90(2)), and a majority of the Justices of each of the Appellate Divisions is given the power to adopt special rules with respect thereto (New York Judiciary Law, § 83). For the past thirty years, the Appellate Division for the First Department has maintained and enforced Special Rules dealing with the conduct of attorneys with respect to contingent fees in claims and actions for personal injury and wrongful death. These rules set up detailed standards of conduct for attorneys acting under such retainers and provide that the violation of the rules shall be deemed professional misconduct (Rules 4(A), 4(B), 4(D), 4(E), 4(F), 4(G) of the Special Rules of the Appellate Division, First Department). Similar rules have been adopted by the Appellate Division for the Second Department, and more recently by the Appellate Division for the Fourth Department.

Rule 4, which is the subject of this action, was first adopted on September 21, 1956, to be effective January 1, 1957. It provides that in personal injury and wrongful

death actions where the compensation of the plaintiff's attorneys is contingent, the receipt of compensation which is equal to or less than the schedule of fees set forth in the Rule is deemed to be fair and reasonable but that the receipt of compensation in excess of the scheduled fees shall constitute the exaction of unreasonable and unconscionable compensation in violation of Canons 12 and 13 of the Canons of Professional Ethics (Papers on Appeal to the Court of Appeals, ff. 91 ff.). The original schedule ran from 50% on the first $1,000,00 of the sum recovered to 15% on amounts in excess of $50,000,00, of the sum recovered. After a public hearing held on December 4, 1956 the Rule was amended and the schedule changed to raise the lower end of the sliding scale to 25% on all amounts in excess of $25,000,00. The amendment also provided as an alternative to the sliding scale a flat 33⅓% of the sum recovered in the event the original contractual arrangement between the attorney and the client so provides (*ibid.* f. 104). The Rule requires that there be filed with the Clerk of the Court a closing statement divulging the amount of recovery, the cost and expenses of the litigation and the net amounts received by the client and by the attorney (*ibid.* ff. 111-115). This part of the Rule is not challenged. Finally, and most importantly, provision is made for an application to the appropriate Court by the plaintiff's attorney in the event he believes in good faith that the schedule will not afford him adequate compensation because of the circumstances of the case. Upon such application, the appropriate Court may, in its discretion, authorize the receipt of additional compensation (*ibid.* ff. 107-110).

This matter was brought on by a motion for summary judgment upon behalf of the appellants. Under the New York practice, the Court may award summary judgment to either party upon such a motion.

The parties are agreed that no question of fact is here presented and the reasonableness of the Rule, as well as

the need for it, were conceded for the purposes of this litigation. The appellants' motion papers stated that whether the Rule was good or bad, necessary or unnecessary, desirable or undesirable, fair or unfair, the Court was without power to adopt and enforce it (*ibid.* ff. 25, 26). The appellees' affidavit in opposition to the motion related in some detail the background of the Rule, its purpose and the compelling circumstances which moved the Court to promulgate it (*ibid.* ff. 42-123).

In the courts of New York State, the main thrust of the attack on the Rule was mounted on the premise that it was a fee-fixing device unrelated to the power of the Court over the professional conduct of attorneys and that the Rule was in conflict with § 474 of the New York Judiciary Law, which provides that the compensation of attorneys is governed by agreement. The appellants conceded that a contract between attorney and client calling for unconscionable compensation was not enforceable in the courts of New York State and that the Appellate Division had plenary power to discipline an attorney for the receipt of unconscionable compensation. The appellants contended, however, that the Court was limited in the exercise of its disciplinary power to acting on an *ad hoc* basis after the fact and that it could not promulgate in advance standards of conduct respecting professional compensation.

The appellees argued that the Rule was promulgated in the exercise of the Court's power over the conduct of attorneys and was designed to remedy an evil that had grown up in the First Department whereby a pattern of 50% contingent fees had developed without regard to the nature and the extent of the professional services rendered. The Court pointed out that the Rule set forth for the guidance of the Bar standards by which the Court would be governed in administering its disciplinary power.

The Opinions below

Both the Special Term of the Supreme Court of the State of New York and the Appellate Division struck down the Rule on the theory that it constituted a fee-fixing device beyond the power of the Court and violated the statutory provision that the compensation of an attorney is governed by agreement, unrestrained by law. (6 Misc. 2d 739, 5 A. D. 2d 303.)

The Court of Appeals reversed and ordered the entry of judgment in favor of the appellees, upholding the validity of the Rule and the power of the Court to promulgate and enforce it. In the course of its determination, the Court of Appeals laid down a definitive interpretation of the Rule which is binding for all purposes on the courts of New York State. The Court rejected the assumption of the appellants that the Rule threatened disciplinary action against attorneys who had entered into retainer agreements that were valid and enforceable under the laws of New York State and held that the Rule did not affect the substantive law governing the relationship between attorney and client but was a procedural device for determining upon the basis of the facts whether a lawyer was subject to discipline for charging more than he could collect in Court from his client under law applicable to every part of the State. The Court viewed the schedules as having a presumptive effect, akin to the burden of proof, and construed the Rule as a procedural device whereby the lawyer may discharge his traditional burden of justifying his compensation arrangements under circumstances which, standing alone, call for an explanation. The Court concluded that the promulgation of the Rule constituted a valid exercise of the power and control of the Appellate Division over the professional conduct of attorneys practicing within the Department.

The Constitutional Questions Presented Are Not Substantial

Although the constitutionality of Rule 4 was briefed and argued in the courts of New York State, and thus drawn in question, this Court should decline jurisdiction on the ground that the constitutional questions presented are not substantial in character. *Zucht* v. *King*, 260 U. S. 174.

Some measure of the lack of substance that inheres in these constitutional issues may be found in the circumstance that eleven of the twelve judges who had the matter *sub judice* did not advert to them in the course of their determinations. Although the issues were briefed and argued before the Special Term of the Supreme Court, the Appellate Division and the Court of Appeals, they are not treated in the opinion of the Special Term, the opinion of the Appellate Division, the majority opinion in the Court of Appeals or the dissenting opinion of Judge Froessel in the Court of Appeals. The sole reference to these issues is found in the concluding paragraph of the dissenting opinion of Judge Burke in the Court of Appeals. Moreover, the seven Appellate Division judges who promulgated the Rule (the appellees herein) were quite obviously free from doubt as to its constitutionality.

The argument in support of the Jurisdictional Statement proceeds on the wholly unwarranted assumption that the courts of New York State are free to disregard the interpretation placed upon the Rule by the Court of Appeals. Thus, at page 15 of the Jurisdictional Statement, it is contended that all attorneys in New York State, save those in the First Department, are free to enforce their contract for compensation made with competent, adult clients, in the absence of fraud or over-reaching: Yet, the Court of Appeals has held that the Rule does not touch lawyers' fees, except such as would be unenforceable under rules

of law applicable to the whole State. This construction of the Rule is binding upon this Court in the exercise of its appellate jurisdiction. *Ward* v. *Krinsky*, 259 U. S. 503.

Since the Rule, as authoritatively interpreted by the Court of Appeals, inhibits, by the threat of discipline, only such compensation as would be uncollectible as a matter of law, it follows that constitutional objections based on due process and equal protection must fall. From time immemorial, lawyers have always been called upon to justify the arrangements made with clients respecting professional compensation and the Canons of Ethics have long provided that contingent fees are subject to the supervision of the Court as to reasonableness. (Canon 13 of the Canons of Ethics of the New York State Bar Association.) These principles are binding upon all of the lawyers of the State without regard to any rules of Court. The sole effect of the Rule, therefore, is to move forward the traditional judicial supervision and burden of justification to a time prior to the receipt of the compensation. Moreover, the Rule is limited in its application to compensation arrangements over and above the specified percentages and the reasonableness of this presumptive classification is not challenged. As the Court of Appeals pointed out, the Appellate Division has the undoubted power to require every lawyer, filing a closing statement on a contingent fee retainer, to disclose the nature and the extent of the services devoted to the cause and thereafter to discipline individual lawyers for the receipt of unconscionable compensation. Included within this broad power of supervision lies the narrow area encompassed by the Rule in question.

That the Rule is a necessary one in the First Department is conceded for the purposes of this litigation. (*Ibid.* ff. 25, 26). The validity of this concession is attested by the circumstances that gave rise to the Rule. (*Ibid.* ff. 47-63). For the past thirty years, Special Rules respecting

contingent fee arrangements have prevailed in both the First and Second Departments and they have long been accepted and acquiesced in by the Bar. The Third Department, on the other hand, has found no need for such rules and the Fourth Department has just recently seen fit to adopt them. Section 83 of the New York Juidiciary Law presupposes that different conditions in the various departments give rise to the need for different rules and hence each Appellate Division is empowered to adopt its own Special Rules. Since Rule 4 does not change the substantive law governing the relationship between attorney and client, the circumstance that it is applicable only to attorneys practicing in the First Department raises no constitutional question. The attorney in the First Department has the same right as any other lawyer in New York State to enforce a valid and subsisting contract for compensation. The fact that he may be called upon at an earlier date to justify what appears on its face to be an unconscionable contract solely within the framework of the disciplinary control of the Bar by the Appellate Division constitutes no infringement of his constitutional rights. This is one of the burdens which accompany the position of responsibility he holds in the judicial system. *Theard v. United States*, 354 U. S. 278. The Rule does not operate directly on the contract or the right to enforce it in an action based on the contract.

Finally, it is clear that this cause involves neither the vitality nor independence of the American Bar. No lawyer will be heard to suggest seriously that the price of "fearless advocacy" is a constitutionally protected right to contingent fees, free from disciplinary limits or supervision. Neither the appellees nor any other court of the State of New York has asserted or attempted to exercise a "power to restrict and limit fees whenever it sees fit so to do". The Rule was designed and intended to do no more than set standards of professional propriety. The flexible nature of these concededly reasonable standards is evi-

denced by the explicit recognition in the Rule that circumstances may render the resulting compensation inadequate and by the provision empowering the appropriate Court to authorize the receipt of additional compensation. (*Ibid.* ff. 107-110.) The appellees have consistently adopted this construction of the Rule and their interpretation has now been made definitive by the Court of Appeals.

CONCLUSION

It is submitted that the constitutional questions presented in the Jurisdictional Statement are lacking in substance and the appeal should, therefore, be dismissed.

December 21, 1959.

Respectfully submitted,

LOUIS J. LEFKOWITZ,
Attorney General of
New York State,
Attorney for Appellees,
80 Centre Street,
New York 13, N. Y.

JAMES O. MOORE, JR.,
Of Counsel.

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Supreme Court, U.S.
FILED
JAN 11 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 544

HARRY A. GAIR, EMILE Z. BERMAN, ROBERT C. KILROE, DAVID C. BRODERICK and JOHN J. TULLMAN,

Appellants,

v.

The Honorables DAVID W. PECK, CHARLES D. BREITEL, BERNARD BOTEIN, BENJAMIN J. RABIN, MARTIN M. FRANK, FRANCIS L. VALENTE and JAMES B. M. McNALLY, individually and as Justices of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department,

Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

HOWARD HILTON SPELLMAN,
39 Broadway,
New York 6, N. Y.,
Attorney for Appellants.

Of Counsel:

HOWARD HILTON SPELLMAN,
SAMUEL G. FEEDMAN,
HENRY A. WEINSTEIN.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

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HARRY A. GAIR, EMILE Z. BERMAN, ROBERT C. KILROE, DAVID C. BRODERICK and JOHN J. TULLMAN,

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Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

Appellees have moved to dismiss this appeal *solely* upon the ground "that the appeal does not present a substantial federal question." (Motion to Dismiss Appeal, p. 1). Their motion does not challenge the fact that the appeal was taken in conformity to statute and the rules of this Court or that the Federal question sought to be reviewed was timely and properly raised and expressly passed upon. There is no contention that the judgment rests on an adequate non-Federal basis. There is no challenge of the citations set forth in our Jurisdictional Statement and no cases are cited by appellees to the effect that any of the questions raised by us have previously been decided adversely to our various contentions by this Court.

Appellees' arguments to the effect that the constitutional questions presented are not substantial are found at pages 6-8 of their motion papers. We now answer them, *seriatim*, without repeating the material already briefed at pages 12-21 of our Jurisdictional Statement (under the heading: "The Questions Are Substantial").

I

Appellees state that, although "the constitutionality of Rule 4 was briefed and argued in the courts of New York State, and thus drawn in question, this Court should decline jurisdiction on the ground that the constitutional questions presented are not substantial in character." They cite *Zucht* v. *King*, 260 U. S. 174. The slightest reading of *Zucht* v. *King* will show that it has no application to the situation now at bar. There, this Court declined jurisdiction *because a long line of decisions had previously passed on the constitutional point presented adversely to the contentions of the plaintiff in error.* No such dilemma now confronts us; because *no* decision of this Court has so passed upon the constitutioaal points here presented, *none* has been cited by appellees and appellees have made *no* effort to contradict the citations in our Jurisdictional Statement of decisions in our favor, or to seek to differentiate *any* of them.

II

Appellees argue that the "lack of substance that inheres in these constitutional issues" is demonstrated by the failure to mention those issues in the course of all but one of the opinions, below. Appellees made precisely this argument before the New York Court of Appeals in resisting our motion before that Court to have the remittitur amended. Point II of their submission on

that motion to the New York Court of Appeals read as follows (Brief of defendants-appellants on Motion for Reargument, pp. 5-6):

> "Both on the oral arguments and in the briefs before this Court and in the two lower courts counsel for the plaintiffs-respondents urged that the Rule was unconstitutional under the Constitution of the United States in that it operated as a denial of due process of law and the equal protection of the laws. The briefs of the defendants-appellants did not treat of this constitutional question since it was deemed lacking in substance. Similarly the opinions of the Special Term, Appellate Division, the majority opinion of this Court and the dissenting opinion of Judge Froessel did not advert to the argument and the only judicial reference to it is found in the concluding sentence of the dissenting opinion of Judge Burke in this Court.
>
> "Under these circumstances, it is difficult to discern how it can be said that the judgment of this Court included a resolution of the constitutional question unless the fact that the question is raised in and of itself ordains such a result."

The New York Court of Appeals, which certainly was in the best position to know whether it had regarded the constitutional questions as substantial, overruled the contention above quoted and certified that it had necessarily passed upon the constitutional questions here under consideration (Order Amending Remittitur, set forth at pages 4c-5c of the Jurisdictional Statement, herein).

Furthermore, the circumstances of the decisions below were such that it would have been completely inappropriate for either the New York Supreme Court (the court of original jurisdiction) or the Appellate Division (the first appellate court) to mention the constitutional points, since *they never had to be reached as a basis for decision*

in either of those courts, due to the fact that, upon *State* statutory grounds, each of those courts ruled in favor of the plaintiffs (here appellants). It was only in the Court of Appeals that it was necessary to make a determination on the constitutional points, since that Court ruled in favor of the defendants (here, appellees) as far as *State* statutory grounds were concerned and, therefore, had to pass on the Federal constitutional issues.

Parenthetically, it should be observed that the present motion inaccurately states that the majority opinion in the Court of Appeals did not treat the constitutional question. Actually, the majority opinion specifically stated that the effect of Rule 4 was such that it is "not subject to attack on the grounds that it is parochial" (6 N. Y. 2d at page 108).

III

Appellees urge that our Jurisdictional Statement "proceeds on the wholly unwarranted assumption that the courts of New York State are free to disregard the interpretation placed upon the Rule by the Court of Appeals." There is no such assumption in our Jurisdictional Statement and none was intended to be made.

Baird v. *Kruska*, 259 U. S. 563, cited at page 7 of appellees' motion, has no application to our contention in the case at bar. Our claim of constitutional infirmity rests upon the proposition that, *even accepting the construction given to Rule 4 by the New York Court of Appeals*, the Rule violates the constitutional rights of appellants. As we have demonstrated in our Jurisdictional Statement, the Court of Appeals could not, by construing Rule 4 as a rule of evidence foreclose this Court from reviewing that construction. *Truax* v. *Corrigan*, 257 U. S. 312, 324, 66 L. Ed. 254, 259.

IV

Appellees argue that, for the purpose of this litigation, we have conceded that Rule 4 is a necessary one in the First Judicial Department. *There has been no such concession made by us at any time in the course of this litigation.*

By the mutual consent of *all* parties, the question of the necessity or desirability of the Rule was eliminated from the case at the time of its first presentation to the New York Supreme Court (the court of original jurisdiction). The moving affidavit for summary judgment stated the following (Papers on Appeal to the Court of Appeals fols. 25-26):

> "The sole question presented for determination in this cause is whether it was within the power of defendants to promulgate the said Rule and whether it is presently within their power to enforce it. Whether the Rule is good or bad, necessary or unnecessary, desirable or undesirable, fair or unfair, responsive or not to the ethical and moral standards of the community, serving or damaging to professional and public interests, it is our contention that the Appellate Division was without power to adopt the Rule and is without power to enforce it. It is the purpose of the present action to obtain a declaratory judgment whether the power does or does not exist."

The answering affidavit on behalf of the defendants (there, appellees) of [then] Presiding Justice PECK *confirmed the non-existence of any alleged concession* as to the necessity, desirability or fairness of Rule 4 in the following language:

> "I have read the affidavit of Emile Zola Berman,

one of the plaintiffs herein, submitted in support of the motion for summary judgment. The defendants are in agreement with the position of the plaintiffs set forth in said affidavit, that the only issue presented in this action is the power of the defendants as Justices of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department to adopt and carry out Rule 4 of the Special Rules Regulating the Conduct of Attorneys and Counselors-at-Law in the First Judicial Department *and that no question respecting the necessity, the desirability and the fairness of the Rule is here involved.* The defendants also agree with plaintiffs' position that this is a proper question for determination in this action and that no triable issue of fact is presented by the pleadings." (*Ibid.*, fols. 44-45, italics supplied).

Flying in the face of this clear *elimination* of any thought of concession, the majority opinion of the New York Court of Appeals nevertheless stated that the *basis* of its decision was the existence of the so-called concession. There is not a *scintilla* of evidence in the record to support this unwarranted assumption. There is not a *scintilla* of proof in the record to justify classification. The concurrence of these faults is the basis for question numbered 6 as set forth at page 6 of our Jurisdictional Statement.

V

It is stated at pages 7-8 of the motion that, for many years, Special Rules respecting contingent fee arrangements have prevailed in various Judicial Departments of New York State. This statement is misleading. There is *no* rule regulating the amount of fees in any Department except the First Judicial Department. The *only*

rule presuming so to regulate compensation of attorneys is Rule 4, presently under attack in this action."

VI

Appellees argue that Rule 4 does not operate directly on the contract of compensation or the right to enforce it in an action based on the contract. Appellees' argument seems to be that an action might technically be brought by an attorney to enforce the contract, *even though he could be disbarred for bringing the suit!* But they *cannot* within the boundaries of serious contention say that one is not deprived of a right when his attempt to enforce that right in a court of law could lead to his professional destruction.

It is significant that, although they now indicate otherwise, the appellees (then appellants) in their brief to the Appellate Division, Third Department, *admitted* that Rule 4 would restrain attorneys from enforcing their retainers. Appellees' brief there stated (at pages 19-20):

> "[t]hat the indirect (or, for that matter, direct) effect of the rule may be to restrain attorneys from enforcing retainers . . .".

VII

Appellees state that neither they nor any other court of the State of New York has asserted or attempted to exercise a "power to restrict and limit fees whenever it sees fit so to do" (quoting from our claim at page 13 of the Jurisdictional Statement). Appellees apparently forget that, in their brief to the Supreme Court of the State of

New York (the court of original jurisdiction), they said (at page 24):

> "Nor are the standards promulgated [in Rule 4] inflexible; they can and will be revised to reflect changing economic or social conditions in this phase of the practice."

Here we have an admission by appellees that it is their intention, whenever *they* believe that fees should be rescheduled, in the light of "social" as well as "economic" conditions, to decide what the members of the bar in one restricted geographical area should be entitled to receive as their compensation for work actually done.

CONCLUSION

The motion to dismiss should be denied.

Respectfully submitted,

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